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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1473

E. I. DUPONT DE NEMOURS AND COMPANY, OLIN CORPORATION, FMC CORPORATION, AMERICAN CYANAMID COMPANY, MONSANTO COMPANY, THE DOW CHEMICAL COMPANY, ALLIED CHEMICAL CORPORATION, HERCULES INCORPORATED, UNION CARBIDE CORPORATION, STAUFFER CHEMICAL COMPANY, DIAMOND SHAMROCK CORPORATION, PPG INDUSTRIES, INCORPORATED, BASF WYANDOTTE CORPORATION, CITIES SERVICE COMPANY, AND N L INDUSTRIES, INCORPORATED,

Petitioners,

v.

RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Petitioners E. I. duPont de Nemours and Company, *et al.*[1] ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 10, 1976.

Opinions Below

The opinion of the court of appeals is not yet officially reported. It is unofficially reported at 8 E.R.C. 1718. The

[1] Petitioners are E. I. duPont de Nemours and Company, Olin Corporation, FMC Corporation, American Cyanamid Company, Monsanto Company, The Dow Chemical Company, Allied Chemical Corporation, Hercules Incorporated, Union Carbide Corporation, Stauffer Chemical Company, Diamond Shamrock Corporation, PPG Industries, Incorporated, BASF Wyandotte Corporation, Cities Service Company, and N L Industries, Incorporated.

opinion and judgment of the court of appeals are annexed hereto as Appendix A.

As noted *infra* the decision of the court of appeals is closely tied to a prior decision of the same court, which earlier decision is the subject of a pending petition for a writ of certiorari. *E. I. duPont de Nemours & Co.* v. *Train*, 528 F.2d 1136 (4th Cir. 1975), *petition for writ of certiorari filed*, No. 75-978.

Concurrently with the filing of this Petition, petitioners are submitting to the Court a motion to consolidate the present Petition with the Petition already docketed at No. 75-978.

Jurisdiction

The judgment of the court of appeals here sought to be reviewed was entered on March 10, 1976. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented[2]

1. Whether district courts or courts of appeals have initial jurisdiction to review regulations issued by the Administrator of the Environmental Protection Agency under the Federal Water Pollution Control Act, as amended, governing wastewater effluent discharges from existing plants.

2. Whether the Federal Water Pollution Control Act, as amended, provides that regulations governing wastewater effluent discharges from existing plants be issued in the form of

(a) "effluent limitations" based upon an authorization said to be implied from Section 301(b) of the Act, or

(b) "guidelines for effluent limitations" in compliance with the express command of Section 304(b) of the Act.

[2] These questions are identical to those presented to this Court in *E. I. duPont de Nemours & Co.* v. *Train*, No. 75-978.

3. Whether when "the Act is not clear" in conferring initial jurisdiction to review regulations for existing plants upon the courts of appeals rather than in providing the normal review in the district courts, the statute should be construed on grounds of practicality to confer such initial jurisdiction on the courts of appeals.

Statutes And Regulations Involved

1. *The Federal Water Pollution Control Act, as amended.* Sections 101, 301, 302, 304, 306, 307, 309, 401, 402, 502, 505 and 509 of the Act (33 U.S.C. §§ 1251, 1311, 1312, 1314, 1316, 1317, 1319, 1341, 1342, 1362, 1365 and 1369) are set forth in Appendix C to Petition, *E. I. duPont de Nemours & Co.* v. *Train*, No. 75-978.

2. *"Effluent Limitations Guidelines" for the Inorganic Chemicals Manufacturing Point Source Category.* The regulations issued by the Administrator which govern the wastewater effluent discharges from existing plants in the Inorganic Chemicals Manufacturing Point Source Category are found at 39 *Fed. Reg.* 9611-9639 (March 12, 1974). They are set forth in Appendix D to Petition, *E. I. duPont de Nemours & Co.* v. *Train*, No. 75-978.

STATEMENT OF THE CASE

This case presents issues of the proper construction to be accorded key sections of the Federal Water Pollution Control Act, as amended ("the Act"), 33 U.S.C. §§ 1251 *et seq.* The issues concern the nature of the statutory authority granted by Congress to the Administrator of the Environmental Protection Agency ("EPA") to issue regulations governing wastewater effluent discharges from existing industrial plants and other existing facilities.

Like the Petition already on file in *E. I. duPont de Nemours & Co.* v. *Train*, No. 75-978 *("duPont I")*, this case specifically relates to EPA's regulations for wastewater effluents from existing facilities in the inorganic chemicals

industry. After informal rulemaking proceedings, on March 12, 1974, the Agency issued final regulations called "[e]ffluent limitations guidelines" for existing facilities in each of 22 product subcategories of the inorganic chemicals industry. (39 *Fed. Reg.* 9611-9635.) EPA said these regulations were being "promulgated pursuant to sections 301 [and] 304(b) . . . of the Federal Water Pollution Control Act, as amended. . . ." (39 *Fed. Reg.* at 9612.)

The fifteen petitioner companies filed timely "protective" petitions for review of the guideline regulations in the U.S. Court of Appeals for the Fourth Circuit. *E.g., E. I. duPont de Nemours & Co.* v. *Train*, No. 74-1261 (4th Cir.).[3] Contemporaneously, eight of the fifteen companies filed a complaint in the U.S. District Court for the Western District of Virginia seeking review of EPA's guideline regulations applicable to existing plants in the sulfuric acid production subcategory of the inorganic chemicals industry. *E. I. duPont de Nemours & Co., et al.* v. *Train, et al.*, Civil Action No. 74-57-R (W.D.Va., filed April 1, 1974). The companies asserted that the district court had jurisdiction of the review action based upon the provisions of 28 U.S.C. §§ 1331, 1332, 1337, 1361 and 1651, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and Section 10 of the Administrative Procedure Act, now codified as 5 U.S.C. §§ 701-706.

On September 27, 1974, the district court issued an opinion and order dismissing the complaint. *E. I. duPont de Nemours & Co.* v. *Train*, 383 F. Supp. 1244 (W.D.Va. 1974). The district court adopted EPA's contentions that Section 509(b) of the Act, 33 U.S.C. § 1369(b), provided for exclusive jurisdiction of any review action in the courts of appeals. This conclusion by the court was based upon the reference in Section 509(b)(1)(E) to effluent limitations under Section 301, and upon the court's acceptance

[3] EPA took the position that review was in the Court of Appeals under Section 501(b)(1)(E). Where Section 509(b) governs review, paragraph 509(b)(1) requires the filing of a petition for review "within ninety days . . ."

of EPA's argument that the Agency had an implied power to issue effluent limitations by regulation for existing plants under Section 301 of the Act, 33 U.S.C. § 1311. The companies had argued that for such existing plants EPA was explicitly mandated by express language in Section 304(b) of the Act, 33 U.S.C. § 1314(b), to issue guideline regulations. The companies contended that review of such guideline regulations did not fall within Section 509(b)'s special provisions for review in the courts of appeals of certain specified EPA actions. EPA had argued that the ostensible mandate of Section 304(b) for guideline regulations should be disregarded; instead, Section 304(b) should be construed as merely providing a "definitional" basis for establishing effluent limitations by regulation.[4]

An expedited appeal of the district court's decision was taken to the Fourth Circuit. That appeal was consolidated for briefing and argument with the protective petitions for review. The companies maintained their claim that the Agency had not followed the Act in issuing its regulations for existing plants, and they correspondingly contested the jurisdiction of the court of appeals. The companies also challenged the Agency's separate regulations for eleven of the 22 product subcategories on the ground that the regulations were not supported by the administrative record.

The court of appeals issued two decisions in the consolidated cases. In the first decision *(duPont I)* the court dealt with the appeal. It upheld its own jurisdiction to review EPA's action in issuing existing plant regulations and thus affirmed the district court's dismissal of the companies' complaint. The court of appeals separated the question of the Agency's authority from the issue of jurisdiction. It ruled that promulgation by EPA

[4] The dispute over the nature of EPA's authority to issue regulations for the wastewater discharges from existing plants had and has considerable practical significance. EPA argued in the district court that its limitation regulations were to be "mechanically cranked" into discharge permits required under the Act for particular plants, without any special reference to a plant's individual circumstances or to the statutory factors set out in Section 304(b)(1)(B) and 304(b)(2)(B).

of the mandated guideline regulations under Section 304 (b) was a necessary step to attainment of the objectives for existing plants set out in Section 301. Consequently, action by EPA under Section 304(b) "should properly be considered to be pursuant to the provisions of [Section] 301 and, therefore, reviewable by this court under [Section] 509." (528 F.2d at 1142: Petition in No. 75-978, Appendix A, at 11-a.)

The petitioner companies filed with this Court the petition for writ of certiorari pending as No. 75-978 to review the court of appeals' *duPont I* decision.

Then, on March 10, 1976, the court of appeals rendered its decision on the protective petitions for review. *("duPont II".)* The court sustained EPA's claim that it could issue effluent limitations by regulation under Section 301, but it ruled against the Agency on the role to be accorded those regulations. The court held that such existing-plant regulations were not binding on the permit-issuing authorities, but rather were only "presumptively applicable." (Appendix A, at 10-a.) In administrative proceedings to establish a discharge permit for a particular plant, the permit applicant could adduce facts respecting the individual plant or facility to rebut the presumption of applicability.

The court then turned to the challenge to specific aspects of the regulations. It set aside the portions of EPA's regulations of general applicability dealing with "process waste water," "process waste water pollutants," and "catastrophic rainfall." (Appendix A, at 19-a to 20-a.) Then the court focussed on the specific subcategory regulations. The companies had challenged all or part of the regulations for eleven different subcategories. In each instance, the court set aside those portions of the subcategory regulations which had been challenged, *i.e.*, all or part of the regulations for the production of chlorine, hydrochloric acid, hydrofluoric acid, hydrogen peroxide, nitric acid, sodium carbonate, sodium dichromate, sodium metal, sodium silicate, sulfuric acid, and titanium dioxide. (Appendix A, at 32-a to 33-a.)

REASON FOR GRANTING THE WRIT

Consideration of This Case In Conjunction With *duPont I* Would Resolve The Four-Way Conflict Among The Courts Of Appeals Respecting The Statutory Responsibilities Of The Administrator For Existing-Plant Regulations.

The questions presented in this case are identical to those posed in *duPont I*. The record is also identical for both cases; they were consolidated in the court of appeals. And petitioners are filing with this Petition a motion to consolidate this case with No. 75-978.

This separate Petition is being filed only to ensure that the Court has before it a consolidated case which fully presents all aspects of the very important issues of the Administrator's implementation of Sections 301 and 304 of the Act respecting regulations applicable to existing-plant discharges. In the response to the Petition in *duPont I*, the Solicitor General agreed that the Court should grant the petition for a writ of certiorari there presented. (Respondents' Memorandum in No. 75-798, at 1.) He also agreed that each of the three questions set out in the *duPont I* Petition were properly presented and should be considered by the Court. (*Id.*, at 6.) However, he expressed the view that this Court, like the Fourth Circuit, "need not decide the question concerning the Administrator's authority" in resolving the conflict among the circuits over the jurisdictional questions. *(Id.)*

However, as the Fourth Circuit said in *duPont II*, the issue of the Administrator's power "goes to the heart of the controversy." (Appendix A, at 5-a.) There is a two-way conflict among the circuits on the jurisdictional questions, but the circuits have split four different ways on the nature of the Administrator's power to issue effluent regulations for existing plants. Compare *CPC International Inc.* v. *Train*, 515 F.2d 1032 (8th Cir. 1975) (Administrator must issue guideline regulations under Section 304), with *American Meat Institute* v. *Environmental Protection Agency*, 526

F.2d 442 (7th Cir. 1975) (Administrator may issue limitation regulations under Section 301), with *American Iron and Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027 (3d Cir. 1975) (Administrator may issue regulations with Section 301 ceilings and Section 304(b) guideline ranges beneath the ceilings), with *duPont II* (Administrator may issue limitation regulations under Section 301 but such regulations are not binding, rather they are "presumptively applicable").

As noted, the petitioner companies prevailed in the court of appeals on those issues which were dependent upon the administrative record. And on the issue of the Administrator's power, the court of appeals did not accept the view of either of the parties but rather adopted elements from each of their positions. Given such results, and the pending Petition in *duPont I*, petitioners ordinarily would not seek review of this case in this Court. However, because the Respondent evidently would advocate a disposition of *duPont I* which would leave outstanding the central issue of the Administrator's power, the petitioner companies have elected to submit this further Petition.

By granting this Petition in conjunction with the Petition in *duPont I*, the Court can consider the matter of the Administrator's power without any constraints, either together with or independent of the jurisdictional issues.

CONCLUSION

As a matter of judicial economy, this Court should grant this Petition along with the previously filed Petition in *duPont I* (No. 75-978). The record in each case is identical as are the questions presented, and all of the petitioners in *duPont I* are also petitioners here. The cases can be consolidated, as in the Fourth Circuit, and a single set of briefs can then be filed.

Until this Court resolves the troublesome and very important issues here presented, the confusing and inconsis-

tent constructions of the key sections of the Federal Water Pollution Control Act will cause delay in achieving the purposes of the Act.

Respectfully submitted,

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APRIL 13, 1976

APPENDIX A

United States Court of Appeals
FOR THE FOURTH CIRCUIT

Nos. 74-1261, 74-1290,
74-1296-1304, 74-1357,
74-1406-7, 74-1588-90,
74-1670-1 and 74-1741

E. I. DUPONT DE NEMOURS & COMPANY
Petitioner,

v.

RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency,
Respondent,

On petitions for review of actions of the Administrator of the Environmental Protection Agency.*

Argued April 22, 1975 Decided March 10, 1976

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*The following Petitions for Review, all naming Train as Respondent, were consolidated.

74-1261 and 74-1357—DuPont & Co.
74-1290 and 74-1299—Allied Chemical Corp.
74-1296 and 74-1303—FMC Corp.
74-1297 and 74-1304—American Cyanamid Co.
74-1298 and 74-1301—Dow Chemical Co.
74-1300 and 74-1302—Olin Corp.
74-1406 and 74-1407—Stauffer Chemical Co.
74-1588—Diamond Shamrock Corp.
74-1589—PPG Industries, Inc.
74-1590—BASF Wyandotte Corp.
74-1670 and 74-1671—Cities Service Co.
74-1741—NL Industries, Inc.

Before RIVES** and BREITENSTEIN***, Senior Circuit Judges, and WIDENER, Circuit Judge.

Robert C. Barnard, Douglas E. Kliever and Charles F. Lettow for the Petitioners.

Kathryn A. Oberly for Respondent. With her on the briefs were Wallace H. Johnson, Assistant Attorney General, Edmund B. Clark, Attorney, Department of Justice, Alan G. Kirk, II, Assistant Administrator for Enforcement and General Counsel, and Ray E. McDevitt, Attorney, Environmental Protection Agency.

Briefs of Amici Curiae were filed by Angus Macbeth and Edward L. Strohbehn, Jr., for Natural Resources Defense Council, Frederick M. Rowe, Edward W. Warren, and Robert F. VanVoorhees for American Petroleum Institute, et al., Russell E. Leasure and Elliot S. Azoff for RMI Company, George C. Freeman, Jr., Turner T. Smith, Jr., and William A. Anderson, II, for Allegheny Power System, Inc., et al., Milton A. Smith, Lawrence B. Kraus, James F. Rill, Max N. Edwards, Richard E. Schwartz, and Collier, Shannon, Rill & Edwards for the Chamber of Commerce of the United States, Robert H. Young, Kenneth R. Myers and Archibald A. Campbell for New Jersey Zinc Company.

BREITENSTEIN, Senior Circuit Judge.

Companies engaged in the production of inorganic chemicals have filed 20 petitions for review of various regulations promulgated by respondent Train as Administrator of the Environmental Protection Agency. The petitions have been consolidated for presentation and disposition. The regulations were promulgated under the Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. §§ 1251-1376. Herein for brevity and clarity the Administrator at times will be referred to as EPA and the statutory references will be those found in the Act as set out in

**Of the Fifth Circuit, sitting by designation.

***Of the Tenth Circuit, sitting by designation.

86 Stat. 816 et seq.[1] Petitioners will be referred to collectively as Industry.

Industry's attack on the jurisdiction of the court of appeals has been rejected by our opinion in No. 74-2237, *DuPont & Company v. Train*.

The objective of the Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a). The goal is the elimination by 1985 of "the discharge of pollutants into the navigable waters." § 101(a)(1). Earlier legislation, which placed on the states the primary responsibility to maintain water quality, had proven inadequate. S. Rep. No. 92-414, 92 Cong. 2d Sess., 2 U.S. Cong. & Adm. News '72 3674. The Act made "a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits." Ibid. at 3675.

Section 301(a) provides that except in compliance with specified sections of the Act "the discharge of any pollutant by any person shall be unlawful." Section 301(b) says that "to carry out the objective of this Act there shall be achieved" stated effluent limitations. Not later than July 1, 1977, those limitations for point sources, except publicly owned treatment works with which we are not concerned, "shall require the application of the best practicable control technology." § 301(b)(1)(A). For July 1, 1983, the requirement is "the best available technology economically achievable." § 301(b)(2)(A).

The foregoing requirements apply to existing sources. For new sources, § 306(a)(1) requires a standard of per-

[1] The parallel U.S. Code citations for the most frequently mentioned sections are:

Section 101—33 U.S.C. § 1251,
Section 301—33 U.S.C. § 1311,
Section 304—33 U.S.C. § 1314,
Section 306—33 U.S.C. § 1316,
Section 402—33 U.S.C. § 1342,
Section 501—33 U.S.C. § 1361,
Section 502—33 U.S.C. § 1362,
Section 509—33 U.S.C. § 1369.

formance "which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology." Section 306(b)(1)(A) directs the Administrator within 90 days after enactment to publish a list of categories which at the minimum shall include 27 named industries among which is "inorganic chemicals manufacturing." Within one year after publication of the list of categories, the Administrator shall publish Federal standards of performance for new sources within each category. § 306(b)(1)(B).

Primary enforcement of the Act is secured through the permit system established by § 402. Permits for pollutant discharge may be issued by the Administrator, § 402(a)(1), or by a state which has adopted a permit program approved by the Administrator. § 402(b). The Administrator has veto power over a state issued permit. § 402(d)(2). All permits shall comply with the applicable provisions of §§ 301, 306, and other specified sections not including § 304. See § 402(a)(1) and (b)(1)(A).

Section 304 is the cause of much of the controversy. Within one year after enactment, the Administrator must publish "criteria for water quality accurately reflecting the latest scientific knowledge" on enumerated subjects. § 304(a)(1). Within the same period the Administrator shall publish regulations "providing guidelines for effluent limitations." § 304(b). Subsection (b)(1)(A) applies to the 1977 step and subsection (b)(2)(A) to the 1983 step. Each subsection mandates consideration of specified factors.

The Administrator did not act within the one year requirements of § 304. Compliance was not within the realm of reality. There are some 28,000 industrial dischargers and 27,000 others. About 30,000 applications for permits were filed. EPA characterizes the Act as "incredibly complex and demanding." A private suit was brought to compel compliance. The result was a court imposed timetable. *Natural Resources Defense Council, Inc. v. Train*, D.C. Cir., 510 F.2d 692, 710-714.

On March 12, 1974, EPA promulgated "effluent limitations guidelines for existing sources and standards of performance * * * for new sources in the inorganic chemicals manufacturing category of point sources." 39 Fed. Reg. 9612 et seq. These are the regulations under attack. In so doing EPA stated that it acted "pursuant to sections 301, 304(b) and (c), 306(b) and (c) and 307(c)." We are not concerned with § 307 which covers certain toxic pollutants. The regulations prescribe "effluent limitations guidelines for existing sources" and "standards of performance for new sources." 40 C.F.R. 401.10.

Industry attacks the regulations generally and specifically. We shall first consider the objections going to all of the regulations and then discuss those applying to particular sources.

I

GENERAL VALIDITY OF REGULATIONS

(a) Notice.

Industry argues that the regulations are invalid because of EPA's failure to give the notice required by the Administrative Procedure Act, 5 U.S.C. § 553(b). In its October 11, 1973, notice of proposed rule-making, 38 Fed. Reg. 28174 et seq., EPA stated that its proposed action was taken pursuant to §§ 301, 304(b) and (c), 306(b), and § 307(c). Public comments received thereafter are contained in pp. 4884-5346 of the Appendix. In its March 12, 1974, promulgation of the regulations, EPA summarized the comments. See 39 Fed. Reg. 9612-9615.

The rule-making and notice provisions of APA "were designed to assure fairness and mature consideration of rules of general application." *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 764. Notice is sufficient if it provides a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3) and *California Citizens Band Association v. United States*, 9 Cir., 375 F.2d

43, 49, cert. denied 389 U.S. 844. Industry had adequate notice and took advantage of it.

(b) EPA's power to establish effluent limitations by regulations.

This issue goes to the heart of the controversy. Industry says that the Administrator promulgates guidelines to be considered by the permit issuer. EPA says that the Administrator establishes effluent limitations by regulations which, with exceptions to be noted later, have uniform application throughout the nation and which must be applied by the permit issuer.

(1) Applicable Law.

The Administrative Procedure Act, 5 U.S.C. § 706 (2)(A), authorizes a reviewing court to set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As said in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." See also *Appalachian Power Company v. Environmental Protection Agency*, 4 Cir., 477 F.2d 495, 506-507. The court may not substitute its judgment for that of the agency. Overton Park, 401 U.S. at 416. If the agency's construction of the controlling statute is "sufficiently reasonable" it should be accepted by the reviewing court. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75.

The grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. *Federal Trade Commission v. Sperry and Hutchinson Co.*, 405 U.S. 233, 249. The agency must "explicate fully its course of inquiry, its analysis and its reasoning." *Ely v. Velde*, 4 Cir., 451 F.2d 1130, 1139; see also *Appalachian Power Company v. Environmental Protection Agency*, 4 Cir., 477 F.2d 495, 507. After the fact rationalization by counsel in brief and argument does not cure non-compliance by the

agency with the stated principles. *Dry Color Manufacturers' Association, Inc. v. Department of Labor*, 3 Cir., 486 F.2d 98, 104, and particularly cases cited in n. 8.

The function of judicial review of agency action is to determine (1) authority of the agency, (2) compliance by the agency with the necessary procedural requirements, and (3) any claim that agency action is arbitrary, capricious, or an abuse of discretion. Citizens to Preserve Overton Park, Inc., 401 U.S. at 415-417. With these principles in mind, we turn to the regulations.

(2) Agency Authority.

The Eighth Circuit has held, *CPC International Inc. v. Train*, 8 Cir., 515 F.2d 1032, that the Administrator may not promulgate regulations establishing effluent limitations for existing sources. The Third and Seventh Circuits have held to the contrary. See *American Iron and Steel Institute v. Environmental Protection Agency*, 3 Cir., slip opinion filed November 7, 1975, p. 8; and *American Meat Institute v. Environmental Protection Agency*, 7 Cir., slip opinion filed November 24, 1975, p. 16. On the mentioned point we disagree with the Eighth Circuit and agree with the Third and Seventh Circuits. Our views on the effect of the regulations will be stated later. The conflict among the circuits emphasizes the confusion caused by this poorly drafted and astonishingly imprecise statute.

The regulations impose "effluent limitations guidelines." The quoted term appears nowhere in the Act. Section 301 refers to "effluent limitations"; § 304 to "guidelines"; and § 306 to "standards of performance." It may be that Congress intended § 304 guidelines to precede § 301 limitations. That did not occur. Under compulsion of a judicially ordered timetable, EPA combined the two steps. The question is the validity of the action taken. Nothing in the Act forbids surmounting the two steps in one jump.

Each party spends much effort in sustaining its position by analysis of the Act and its legislative history. Without going into any details, it is enough to say that the Act is

vague, uncertain, and inconsistent. Support can be had for diametrically opposed conclusions. Except for some statements in committee reports, see e.g. our opinion in No. 2237—*DuPont v. Train*, the two-volume, 1766 page, Legislative History is of little help. In it, statements can be found to uphold almost any position which one cares to take.

We are faced with the problem of making workable a vague, regulatory statute so as to attain the congressional objective that the discharge of pollutants be eliminated. This end may not be reached by quibbling over semantics. Ambiguity must be transformed into practicality.

Section 304(b) specifically authorizes the Administrator to publish "regulations, providing guidelines for effluent limitations." Nothing is said in § 301 about regulations. The source of power to impose § 301 limitations by regulations can only come from § 501(a) which authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under this Act."

The question then is what are his functions. Section 101(d) says that he "shall administer this Act." The control technology mentioned in § 301(b)(1)(A) and (b)(2)(A) is that defined and determined by the Administrator under § 304. Section 301(e) refers to "[e]ffluent limitations established pursuant to this section" but does not say who does the establishing. The Act is unworkable unless someone takes the initiative in deciding what limitations are generally applicable to discharges, whether by individual plants, categories, subcategories, classification, or otherwise. Because the control technology is determined by the Administrator, it is reasonable that he establish the limitations generally applicable to categories. Such action is within the performance of his functions.

From a practical standpoint we find no objection to the combining of limitations and guidelines. The Administrator was faced with unrealistic statutory requirements and a court imposed timetable. He had the duty to proceed. His action was "sufficiently reasonable" and should

be accepted by a reviewing court. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75. We conclude that he had authority to promulgate regulations establishing limitations for existing sources.

(3) Effect of Exercise of Authority.

The authority to promulgate the regulations must not be confused with the effect of those regulations. Industry says that the effect will violate the Act and, hence, the regulations are invalid.

In part the controversy is whether the regulations are § 301 limitations or § 304 guidelines. The regulations impose "effluent limitations guidelines." EPA says in effect that the regulations impose limitations which are applicable uniformly throughout the nation and, with some exceptions, must be mechanically cranked into each permit by the issuer. Industry says that the regulations are guidelines for the information of and consideration by, but not binding on, the permit issuer. Inherent in this dispute is the question of national uniformity versus state power and responsibility.

Section 101(a) refers to the "integrity of the Nation's waters," "the national goal," and "the national policy." Section 101(b) says that the policy of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."

Subsections 402(a)(1) and (b)(1) say that the permits shall comply with §§ 301, 306, and other sections not including § 304. If national uniformity is controlling, state action in issuing permits is inhibited. If the regulations are informational, the states may exercise reasonable discretion in permit issuance.

The Act, § 502(11), defines "effluent limitation" to mean "any restriction established by a State or the Administrator." The pertinent regulation, 40 C.F.R. § 401.11(i), defines the same term to mean "any restriction established

by the Administrator." The conflict must be resolved in favor of the statute. Accordingly, an effluent limitation may be established either by a state or by the Administrator. However, we go around in a circle because § 402(d)(2) gives the Administrator veto power over state action. Section 401.11(i) is set aside and remanded for reconsideration.

For all sources, both existing and new, we believe that the solution which most nearly satisfies congressional intent is recognition that the regulations are presumptively applicable to permit applications. The regulations control unless that presumption is rebutted. Thus, national uniformity, subject to limited specific exceptions, is attained. The balance of general rule and narrow exceptions assures all possible uniformity without sacrifice of the flexibility needed to adjust for disparate plants in dissimilar circumstances.

Both the Act and the regulations recognize permissible variances. Section 301(c) empowers the Administrator to modify the requirements of § 301(b)(2)(A), 1983 phase, upon a showing that modified requirements "(1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Industry points out that this does not apply to the 1977 limitations. However, in each of the regulations applicable to the 1977 phase for those subcategories under consideration, there is recognition that adjustments may be appropriate for certain plants and provision for pertinent procedures. See e.g. 40 C.F.R. § 415.62 applying to chlorine. The differences between the provisions of the statute and those of the regulations are of no present concern. Both recognize and permit variances. In any event, the "best practicable control technology" for 1977 may not be construed more stringently than the "best available technology economically achievable" as ameliorated by the qualification of § 301(c) for 1983 limitations.

Provisions for variances, modifications, and exceptions are appropriate to the regulatory process. See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755. They have been recognized in actions pertaining to environmental regulations. See e.g. *Portland Cement Association v. Ruckelshaus*, D.C. Cir., 486 F.2d 375, 399, cert. denied 417 U.S. 921, and *International Harvester Co. v. Ruckelshaus*, D.C. Cir., 478 F.2d 615, 641. The administration of these provisions in practice is a matter of speculation at the present. The question will arise when a claim for a variance is made in a permit application.

Neither the Act nor the regulations contain any variance provision for new sources. The rule of presumptive applicability applies to new sources as well as existing sources. On remand EPA should come forward with some limited escape mechanism for new sources.

In the discussion which follows we shall treat the regulations as presumptively applicable to both existing and new sources.

(c) Agency Compliance with Procedural Requirements.

The issues involved will be considered separately.

(1) Subcategories.

EPA imposed the limitations on the basis of subcategories. Industry desires that the limitations be fixed on the basis of individual plants.

The provision relating to the 1977 step, § 301(b)(1)(A), refers to "effluent limitations for point sources." For the 1983 step the provision, § 301(b)(2)(A), is "effluent limitations for categories and classes of point sources." The section applicable to new sources provides, § 306(b)(1)(A), that the Administrator shall publish "a list of categories of sources" which shall include specified industries.

"Point source" is defined, § 502(14), as a "conveyance *** from which pollutants are or may be discharged."

Read literally the 1977 requirement is for determination on the basis of individual discharges. The 1983 and new source requirements are on the basis of categories. We do not know the reason for the difference. Whatever it may have been, July 1, 1977, approaches and a holding that EPA must now start over and make the 1977 determinations on the basis of many thousands of individual plants would be chimerical. Practical considerations may not be ignored. A remand of all of the regulations pertaining to the 1977 step would result in administrative delay, have the potential of judicial review, and further postpone attainment of the Act's objectives. In the circumstances we accede to the EPA procedure of promulgating general regulations which impose presumptively applicable effluent limitations for all three steps on the basis of categories.

With regard to the 1977 step, the reference in § 301 (b)(2)(A) to "point sources" is taken to mean that Congress intended that the permit grantor should give individual attention to each "point source" and apply the factors specified in § 304(b)(1)(B). Some of those factors, e.g., "age of equipment and facilities involved," can only be applied on an individual basis. EPA recognized this problem when it included variance provisions in its regulations for the 1977 step. See e.g. 40 C.F.R. § 415.62 and the reference therein to factors which are "fundamentally different."

For the inorganic chemical manufacturing industry EPA established 22 subcategories based on the chemical product manufactured. In addition where dissimilar processes are used to manufacture the same product the limitations are refined to provide separate limitations within the subcategory.

The method of categorization adopted by EPA will reasonably effectuate the congressional objectives. Further subdivision might unduly complicate the administration of the Act. Rulemaking of necessity is general. Problems relating to specific factual situations are for determination at the permit-issuing stage.

(2) Use of single numbers.

The regulations impose limitations in terms of single numbers rather than in a range of numbers. Industry attacks this method saying in effect that EPA promulgated guidelines and that guidelines are not absolutes. Nothing in the Act prohibits the Administrator from using single numbers in establishing effluent limitations. The use of a single number limitation for discharge, permits any discharge from zero up to the allowed amount, subject always to the principle of presumptive validity which we have stated.

We are aware that the Third Circuit, *American Iron and Steel Institute v. Train*, supra, has held that the regulations there considered are invalid because "they failed to provide meaningful ranges or guidance in considering individual factors." Slip opinion at p. 37. On the facts presented to us, we cannot accept that conclusion. The EPA has promulgated zero discharge limitations with regard to many of the discharge sources which are before us. If a range is required, a zero discharge provision violates the Act. An objective of the Act is the elimination of all pollutant discharges by 1985. § 101(a)(1). The expertise of the Administrator is persuasive as to whether the limitations be fixed in single numbers or ranges. A claim of arbitrary action in this regard may be considered in court review under § 509(b)(1)(E) of the issuance or denial of a permit. Then specific facts may be presented and the problem will be actual rather than hypothetical. It may be that with some categories ranges are desirable and with others single numbers are appropriate. We are dealing with the general problem and decline to make advisory statements covering specific applicability. For the purposes of the suit before us relating to "inorganic chemicals manufacturing," we accept the Administrator's use of single numbers.

(3) Statutory Factors.

Section 304(b)(1)(B), 1977 step, and § 304(b)(2)(B), 1983 step, specify factors to be taken into account to

determine control measures. For existing sources, these are essentially the same except in one respect. The 1977 step includes "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." A balancing is required. For the 1983 step there is no reference to balancing and the listed factors include "cost of achieving such effluent reduction." For new sources the requirement is the effluent reduction "achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives." § 306(a)(1).

A basic problem is the effect to be given the factors specified in § 304(b)(1)(B) and (2)(B). Section 301, which provides for effluent limitations, says in its subsection (1)(A) that the 1977 step requires the technology "as defined by the Administrator pursuant to section 304(b) of the Act." For the 1983 step the language is "in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act." We know of no reason for the change in language. Be that as it may. The reference in § 301 to § 304 must mean that Congress intended that the factors specified in § 304 are pertinent to effluent limitations established under § 301. Some of the specified factors are of practical applicability only to individual plants, for example "age of equipment and facilities involved." We construe the congressional intent to be that the specified factors shall be applied by the permit issuer in determining whether the presumptively valid effluent limitations should apply to a particular source of discharge. This construction does not derogate the power of the Administrator to issue general regulations fixing presumptively valid effluent limitations on categories.

With reference to the cost-benefit provision Industry contends that EPA must first make an overall cost/benefit analysis and then elaborate how that analysis shall be applied in the consideration of permits for individual plants. We believe that an overall cost/benefit analysis for each subcategory satisfies the statutory requirements. Such

an analysis for each of the many thousands of dischargers and permit applicants would be impractical for general regulations. In acting on permit applications, the issuer will properly consider cost/benefit analysis along with the other factors specified in § 304(b).

We reject the argument of Industry that benefits must be quantified in monetary terms. Nothing in the Act requires this action.

Industry says that as to existing sources EPA is confined to "end of the pipe" treatment systems. The Act does not so provide. The provisions applicable to both the 1977 and 1983 phases, § 304(b)(1)(B) and (2)(B) refer to "measures and practices" and direct the Administrator to consider "process changes."

Both the mentioned subsections require EPA to consider "non-water quality environmental impact (including energy requirements)." Pollutant wastes which may not be recycled and for which there is no commercial market have to be disposed of in some other way. They may be discharged into water, vented into the air, or collected in a land-fill. Air discharge brings into play the Clean Air Act, 42 U.S.C. § 1857 et seq. Land-fills present local problems and the application of local laws. We believe that EPA has given adequate consideration to the non-water environmental impact except in the cases of certain subcategories to be mentioned later.

Energy requirements present a serious problem in the light of the existing energy crisis with spiraling prices. Unquestionably, many of the regulations will require the use of more energy. EPA and Industry are in sharp dispute over the amounts and costs of the energy required. We do not know which is right. One thing is certain. Costs to the consumers will rise. So far as the inorganic chemical manufacturing category is concerned we are satisfied with the EPA actions, except insofar as later mentioned subcategories raise problems.

For the 1977 phase the requirement is "the application of the best practicable control technology currently avail-

able." § 301(b)(1)(A). The Industry reply brief in Nos. 74-1261 etc. at 44 acknowledges that "the 1977 effluent guidelines can be based on the performance of the best plants or performance achieved by no plant if the Agency finds that the level of achievement in the subcategory is uniformly inadequate." Industry conceives of problems which will arise when plants in a subcategory use different processes. This matter is best considered in connection with the specific subcategories.

For the 1983 phase the requirement is "application of the best available technology economically achievable." § 301 (b)(2)(A). In this regard Industry concedes, Ibid., that "the Agency may look to the best performer and even assess technologies that have not been applied." The concern of Industry is the adequacy of the variance provisions. We will not assume inadequacy. The problem can be considered when and if it arises.

For new sources, § 306(a)(1), standards of performance must be both "available" and "demonstrated." Problems connected with new source standards for specific subcategories will be dealt with in our discussion of those subcategories.

With the exceptions noted, we believe that EPA has satisfied the statutory procedural requirements.

(d) Relationship of the three steps.

The problem here is the relationship of the 1977 limitations, the 1983 limitations, and the new source standards. The orderly progression is (1) 1977 limitations, (2) new source standards, and (3) 1983 limitations. No instance is called to our attention in which the 1977 limitations are more strict than the new source standards or the 1983 limitations. At times the 1977 limitations are the same as the new source standards.

The difficulty arises from uncertainty as to the relationship of the 1983 limitations to the new source standards. Industry says that the 1983 limitations may not be more

stringent than the new source standards. We are thrust into another area of confusion. Section 306(d) prescribes a grace period. It concerns "standard of performance," a term specifically defined in § 306(a)(1). We do not know whether Congress intended to equate "effluent limitations" as used in § 301(b) and defined in § 502(11) with "standard of performance." Nor do we know the intent of Congress with reference to the applicability of the grace period to plants the construction of which began after the passage of the Act in 1972 and before the promulgation of the regulations in 1974. All we can say is that nothing pertaining to § 306(d) is before us. The construction and application of § 306(d) is for decision when a specific controversy is presented.

Improvements in the techniques of waste disposal can be reasonably expected by 1983. Except for such situations as are later determined to be within the § 306(d) grace period, plants which go on the line between the passage of the Act and 1983 are subject to the 1983 limitations.

The language of the Act is such that the 1983 limitations, to some extent, must be anticipatory. We do not know what will be "the best available technology economically achievable" in 1983. See § 301(b)(2)(A). Section 304(b) requires the publication of regulations within one year. In 1974 the Administrator promulgated regulations setting forth 1983 limitations. Industry was under the statutory compulsion of bringing a petition for review within 90 days of promulgation. See 509(b)(1). The circumstances thus require speculation as to what will be the 1983 technology.

We are presented with an anomaly. We cannot determine the validity of an unknown. Industry is entitled to know the limitations which will confront it in 1983. By its regulations EPA has told Industry what to expect in 1983 and by so doing has given Industry lead time within which to make such changes as may be necessary. For practical purposes our review at this time must be confined to a determination of whether the record discloses a rea-

sonable basis for belief that a new technology will be available and economically achievable.

Clarification may come through EPA review and revision of the regulations as provided in §§ 301(d) and 304(b). We assume EPA compliance with these provisions. See *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 and *Douglas v. Noble*, 261 U.S. 165, 170. Section 301(c) authorizes the Administrator to modify the 1983 requirements for a permit application filed after July 1, 1977. We assume that if industry believes that the technology on which the 1983 limitations are based is not available or economically achievable, it will seek modification. We realize that the modification procedure of § 301(c) does not include situations where permit applications were filed before July 1, 1977. If any controversy arises whether a point source, the application for which is filed before July 1, 1977, is entitled to a modification of the 1983 limitations, that controversy will then have to be determined. It is not now before us. Our concern is with general regulations.

Section 509(b)(1) permits a petition for review to be filed after the mentioned 90 day period "only if such application is based solely on grounds which arose after the ninetieth day." This provision, when coupled with the review and revision provisions of §§ 301(d) and 304(b) provides a mechanism for future administrative and judicial action on the basis of actual rather than anticipated conditions.

In our later discussion of the 1983 requirements, we recognize the problems which have been mentioned. In each instance where we set aside a 1983 regulation we do so on the basis of technical objections, either conceded or presently apparent. We decline to engage in speculation.

(e) Arbitrary and capricious action.

EPA actions in promulgating the regulations may not be arbitrary, capricious, or an abuse of discretion. Except as noted in our discussion of specific subcategories, we believe that the regulations do not violate the stated principle.

II

VALIDITY OF PARTICULAR REGULATIONS PERTAINING TO MORE THAN ONE SUBCATEGORY

(a) Definitions of "process waste water" and "process waste water pollutants."

Each of the attacked subparts of 40 C.F.R. Part 415 incorporates the definitions found in 40 C.F.R. § 401. "Process waste water" is defined by § 401.11(q) and "process waste water pollutants" by § 401.11(r).

With particular reference to chlorine, EPA says (Brief in Nos. 74-1261 etc., p. 97) that it will amend the "process waste water" definition "to make clear that it does not extend, in the context of no discharge standards, to unavoidable leaks and spills."

With particular reference to nitric acid, EPA says (Brief in Nos. 74-1261, etc. at 118) that:

> "***the Agency is preparing a proposed amendment to the definition of 'process waste water' and 'process waste water pollutant.' (40 C.F.R. sec. 401.11(q)(r)) which will make clear that in the case of point sources subject to a no discharge limitation, water which has had only incidental contact with raw materials, intermediate products, finished products, byproducts or waste products will not constitute process waste water."

Accordingly, § 401.11(q) and (r) are set aside and remanded for reconsideration.

(b) Catastrophic rainfall.

A number of the regulations pertaining to 1983 limitations and new source standards contain exceptions relating to catastrophic rainfall. For example §§ 415.93(b)(2) and 415.95(b)(2), relating respectively to 1983 limitations and new source standards for hydrogen peroxide production, provide:

> "A process waste water impoundment which is designed, constructed, and operated so as to contain the precipitation from the 25 year, 24 hour rainfall event as established by the National Climatic Center, Na-

> tional Oceanic and Atmospheric Administration for the area in which such impoundment is located may discharge that volume of process waste water which is equivalent to the volume of precipitation that falls within the impoundment in excess of that attributable to the 25 year, 24 hour rainfall event, when such event occurs."

The first difficulty is with the word "impoundment." We are not sure what it means in the context in which it is used. Industry's objections go to the extent of the included area. In its discussion of hydrofluoric acid EPA says (Brief in Nos. 74-1261, etc. p. 106) that it will propose an amendment to 40 C.F.R. § 415.81 defining the term "within the impoundment." We believe that the new definition should apply to all regulations now using the term.

Industry objects to the test stated as "the 25 year, 24 hour rainfall event." It says that this was added in the final regulations and it did not have an opportunity to comment. We are referred to nothing in the record which justifies the test. The problem is for the experts and should be solved administratively rather than judicially. Industry says that in an area where precipitation exceeds evaporation the regulation requires an infinitely expanding pond to contain all rainfall (less evaporation) that may fall other than during a catastrophic storm. Absent facts of which we are not aware, the position of industry appears correct. The catastrophic rainfall provisions should be the same for the 1983 phase and for new sources. Rain will affect each.

The various regulations pertaining to catastrophic rainfall are set aside and remanded for reconsideration. The specific regulations affected will be mentioned in the discussion of pertinent subcategories.

III
SPECIFIC SUBCATEGORIES

(1) Chlorine—40 C.F.R. Part 415, Subpart F.

This subpart relates to discharges of pollutants from the production of chlorine and sodium or potassium hydroxide

by the diaphragm cell process and by the mercury cell process. The regulations provide specified limits for pollutant discharge at the 1977 deadline (§ 415.62) and for new sources (§ 415.65). For the 1983 deadline the requirement is no discharge (§ 415.63).

The record pertaining to the 1983 no discharge provision presents unexplained inconsistencies. The Development Document says, App. 5778, that, "There is no known problem which has not been solved by at least one plant of this survey." Contrariwise, EPA in its preamble for proposed rulemaking effluent limitations guidelines for the inorganic chemical industry says, 38 Fed. Reg. 28180, with reference to chlorine plants using the diaphragm and mercury process that "no plants are currently achieving no discharge of process waste water pollutants." If EPA has any explanation of the inconsistency, it is so hidden in a mass of technical detail that we cannot find it.

We have heretofore discussed the relationship between the three steps, 1977, 1983, and new sources. We have also mentioned the waste water definitions and the catastrophic rainfall provisions, all of which are pertinent to § 415.63. Until we know what changes EPA will make and what will be the effect thereof, there is no need to consider the problem further.

Section 415.63 is set aside and remanded for reconsideration.

(2) Hydrochloric Acid—40 C.F.R. Part 415, Subpart G.

This subpart relates to discharges of pollutants from the production of hydrochloric acid by direct reaction of chlorine and hydrogen. The regulations provide for no discharge of pollutants by existing plants at both the 1977 (§ 415.72) and 1983 (§ 415.73) deadlines and by new sources (§ 415.75).

After referring to the waste water definitions, EPA says (Brief in Nos. 74-1261 etc. at 104-105) that it did not intend to subject hydrochloric acid plants to no discharge stan-

dards "for occasional sources of waste." Accordingly, a remand is required.

We doubt the propriety of EPA's use of Hooker Chemical plant as exemplary to support the no discharge requirements. The record shows that the Hooker plant has no discharge of pollutants "during normal operation" but does during "start-up of production runs." The EPA explanation of the technology applicable to the start-up discharges is not convincing and we doubt whether Hooker can be treated as an exemplary plant. On remand, EPA must clearly articulate its position in these regards.

Sections 415.72, 415.73 and 415.75 are set aside and remanded for reconsideration.

(3) Hydrofluoric Acid—40 C.F.R. Part 415, Subpart H.

This subpart relates to discharges of pollutants from the production of hydrofluoric acid. The regulations provide specific limits for pollutant discharge at the 1977 deadline (§ 415.82) and for no discharges at the 1983 deadline (§ 415.83) and for new sources (§ 415.85). Provisions relating to catastrophic rainfall are included in each of the mentioned regulations.

On January 9, 1975, EPA published proposed new regulations for hydrofluoric acid. See 40 Fed. Reg. 1712. The comment period has expired but we do not know what will be the ultimate result. EPA does not expect to promulgate final amendments before March, 1976. In the circumstances, the preferable procedure is to nullify the existing regulations.

Sections 415.82, 415.83, and 415.85 are set aside and remanded for reconsideration.

(4) Hydrogen Peroxide—40 C.F.R. Part 415, Subpart I.

This subpart relates to discharges of pollutants from the production of hydrogen peroxide by the electrolytic process and by the oxidation of alkyl hydroanthraquinones (organic process). The regulations provide specified limits

for pollutant discharge at the 1977 (§ 415.92) deadline and no discharge at the 1983 (§ 415.93(a)) deadline and for new sources (§ 415.95(a)) for plants using either process. As to plants using the electrolytic process the no discharge provisions for 1983 and for new sources contain catastrophic rainfall exceptions (§§ 415.93(b)(2) and 415.95 (b)(2)).

EPA says (Brief in Nos. 74-1261 etc. at 192 and Brief in Nos. 74-1296 etc. at 42) that it will reevaluate the 1983 and new source provisions pertaining to the organic process (§§ 415.93(a) and 415.95(a)).

Industry attacks the 1983 no discharge provision for plants using the electrolytic process. The FMC plant at Vancouver, Washington, is the only plant in the United States using this process for hydrogen peroxide production. The purity of its product permits it to compete with plants using the organic process. EPA's analysis (App. 1182-1183) shows that the differences in quality of influent well water and effluent discharge into the Columbia River are negligible. The discharges are environmentally insignificant. We cannot comprehend how a change from the present process to the EPA technology, evaporation and landfill, will be beneficial. Because EPA is to reexamine its waste water definitions and because of the difficulties which we have noted with the catastrophic rainfall provisions, this regulation must be remanded. On reconsideration, EPA must give consideration to the total environmental impact.

The no discharge regulation for new electrolytic plants must also be remanded. Our comments on the definitions of waste water and on the catastrophic rainfall provisions are as applicable here as they are to the 1983 requirements for existing plants.

Sections 415.93 and 415.95 are set aside and remanded for reconsideration.

(5) Nitric Acid—40 C.F.R. Part 415, Subpart J.

This subpart relates to the discharges of pollutants from the production of nitric acid in concentrations up to 68 per-

cent. The regulations provide for no discharges at the 1977 and 1983 deadlines for existing plants (§§ 415.102 and 415.103) and for new sources (§ 415.105).

EPA concedes, with particular reference to nitric acid, that the waste water definitions must be reconsidered both as to existing plants (§§ 415.102 and 415.103) and as to new sources (§ 415.105). See EPA brief in Nos. 74-1261 etc. at 117-118 and in Nos. 74-1296 etc. at 66-67.

On the recycling problem, the record is so confused that we cannot say with any certainty which party is right. Hopefully, the remand will result in clarification. On the cost analysis, Industry objects to EPA's use of information obtained from sulfuric acid plants. EPA responds that in the time available it had no alternative. Now, it has had more time and should specify the facts and reasons on which its conclusions are based.

Sections 415.102, 415.103 and 415.105 are set aside and remanded for reconsideration.

(6) Sodium Carbonate—40 C.F.R. Part 415, Subpart O.

This subpart relates to discharges of pollutants from the production of sodium carbonate by the Solvay process. The regulations applicable to existing sources both at the 1977 and 1983 deadlines (§§ 415.152 and 415.153) specify the permissible discharges with reference to both TSS and pH. TSS means total suspended nonfilterable solids. § 401.11 (s)(5). The term pH is a logarithmic expression of the concentration of hydrogen ions in water, with 7 pH indicating a neutral condition. Lower pH values show acidity and higher values alkalinity. For new sources the requirement is no discharge (§ 415.155).

EPA admits errors in the TSS requirements (Brief in Nos. 74-1261 etc. at 134) and says (Ibid. at 135) it will "not oppose a remand of the suspended solids limitations in 40 C.F.R. Section 415.152 and 415.153 for consideration of the appropriate flow rate and the projected economic impact on the industry."

Industry contends that the pH requirement should also be remanded. We agree. Nothing in the record sustains the EPA conclusion that neutralization of the inherently alkaline effluent from a sodium carbonate plant is practicable or economically achievable. The justification in the brief is no substitute for agency action not sustained by the record. Also, the cost of neutralization should be considered along with the cost of removal of suspended solids. On remand EPA should make clear the technologies which it deems available.

The regulation for new sources mandates that there be no discharge. This is in conflict with the EPA statment, 38 Fed. Reg. 28179, that:

> "§ ***no technology is available and economically achievable for the elimination of discharge from Solvay plants."

The EPA brief comments (Brief in Nos. 74-1296 at 53) that "The Solvay process generates staggering quantities of waste products." It also says (Ibid.):

> "As has been seen, there are practicable alternatives to discharge from a new Solvay plant if one is ever built. The Agency properly set the standard of performance for this unlikely plant."

The EPA alternatives are (1) use of deep well injections and (2) production of sodium carbonate by the Trona ore process. Both of these present non-water environmental problems. Deep-well injection raises both federal and state problems and has been the subject of EPA litigation. See *e.g. United States v. Armco Steel Corporation*, S.D. Tex., 333 F. Supp. 1073. Trona plants present an air pollution problem which EPA has recognized. See 39 Fed. Reg. 25339.

Industry argues that EPA has no statutory power to force industry to use a certain process. There is no need to explore the legal ramifications of this contention. It is enough to say that the technology on which EPA bases its new source standards is neither available nor demonstrated when regard is had for non-water environmental impact.

Sections 415.152, 415.153, and 415.155 are set aside and remanded for reconsideration.

(7) Sodium Dichromate—40 C.F.R. Part 415, Subpart Q.

This subpart relates to discharges of pollutants resulting from the production of sodium dichromate and by-product sodium sulfate. The regulations provide for permissible, specified discharges by existing plants at the 1977 deadline (§ 415.172) and by new sources (§ 415.175). No pollutant discharge is permitted at the 1983 deadline except discharges attributable to catastrophic rainfall (§ 415.173).

Industry attacks the 1983 no discharge provision. In its discussion of sodium dichromate, EPA said, 39 Fed. Reg. 9614:

> "The proposed new source performance standards were based on evaporation to attain no discharge of process waste water pollutants. Considering nonwater environmental aspects, the new source performance standards have been revised to require good water conservation and best practicable technology."

EPA's rationalization of its actions is not convincing. It says (Brief, Nos. 74-1261 etc. at 171) that "[a]s to the reasonableness of the Administrator's conclusion that evaporation represents an available technology for 1983, there can be no serious challenge." It then says (Ibid. at 173) that its new source provision was in response to Industry's concern that "evaporation had not been sufficiently demonstrated on the volumes encountered in the manufacture of sodium dichromate." It also says (Ibid. at 174) that it deferred imposition of zero discharge for existing sources until 1983 "because of its reassessment of the technological development of evaporative systems on waste loads as large as those generated by this subcategory, as well as energy consumption demands in a time of general concern about energy supply." We are confused rather than convinced. The manufacture of sodium dichromate produces large quantities of waste discharges. Disposition of these wastes by evaporation imposes a severe demand on use of energy.

EPA does not disclose what evaporative technology it uses in making its cost analysis, its energy study, or its consideration of the non-water environmental impact.

In essence EPA asks us to have faith in its expertise and, on that ground, uphold its actions. Judicial review must be based on something more than faith and respect. Confidence and deference do not substitute for reasoned analysis sustained by the record. In the circumstances we see no need to explore the technical arguments of the parties going to environmental impact, costs, and energy requirements. We are hopeful that on remand EPA will give further consideration to these problems.

Section 415.173 is set aside and remanded for reconsideration.

(8) Sodium Metal—40 C.F.R. Part 415, Subpart R.

This subpart relates to discharges of pollutants from the production of sodium metal by the Downs cell process. The regulations provide specified limits for pollutant discharge at the 1977 deadline (§ 415.182) and no discharge at the 1983 (§ 415.183) deadline and for new sources (§ 415.185). The no discharge provisions for 1983 and for new sources contain catastrophic rainfall exceptions (§§ 415.183(b) and 415.185(b)).

The pertinent Industry brief is presented by Stauffer Chemical Company. EPA says that Stauffer has no standing because it is not a producer. Stauffer is admittedly a purchaser and user of sodium metal. Section 509(b)(1) of the Act authorizes review "by any interested person." Section 502(5) defines "person" to include "a corporation." Accordingly Stauffer has the requisite standing.

Industry attacks the 1977 requirement that the TSS average daily discharge shall not exceed 23 kilograms per 1,000 kilograms of product. EPA says that this can be achieved by use of "well designed settling basins." With general reference to the inorganic chemical industry, the Development Document says that the performance and cost of

settling basins "depends on the amount of waste involved and the settling characters of the solids suspended." The trouble is that EPA does not demonstrate how this general principle applies to sodium metal. EPA exemplary plant, the DuPont plant at Memphis, does not achieve the requirement of the regulation.

Industry says that EPA imposed the no discharge limit without regard for the environmental impact or the energy costs, factors which § 304(b)(2)(B) of the Act requires EPA to specify. Specifically, Industry says that EPA did not take into account the cost of solid waste disposal and failed to consider energy requirements. The unsatisfactory EPA response is that it did pay attention to these factors and that it developed estimates for all treatment measures of general application to the inorganic chemical industry. It does not relate any of these to the particular conditions found in the sodium metal industry.

EPA concedes (Brief in Nos. 74-1261 etc. at 167) that the Development Document does not "include significant energy costs associated with no discharge." It goes on to say that it estimated the capital cost of attaining no discharge. An estimate of capital cost is not consideration of the environmental impact or of the energy requirement.

Because we are convinced that the 1983 regulation must be set aside, we need not delve into the detailed attack made by Industry on the EPA technology or the complex answers thereto. On remand EPA must do a better job of articulating the facts and reasons upon which its conclusions are based.

EPA justifies its no discharge requirement for new sources by reliance on the "technological basis" for the 1983 limitations (Brief in Nos. 74-1296 etc. at 30). Because we set aside the 1983 regulation, no need exists for further discussion of the problem in connection with new sources.

Our earlier action in regard to the catastrophic rainfall provisions applies to both the 1983 and new sources provisions.

Sections 415.182, 415.183 and 415.185 are set aside and remanded for reconsideration.

(9) Sodium Silicate—40 C.F.R. Part 415, Subpart S.

This subpart relates to the discharge of pollutants from the production of sodium silicate. The regulations applicable to existing sources by July 1, 1977, specify the permissible discharges. § 415.192. For 1983 and for new sources no pollutant discharge is permitted. §§ 415.193 and 415.195.

Consideration of the sodium silicate regulations stretches our patience to the breaking point. EPA did not furnish the data on its exemplary plant until after the Industry's first brief. After receipt of the data, counsel for Industry wrote counsel for EPA expressing concern over the fact that the EPA contractor (Industry reply brief in Nos. 74-1261 etc. at App. F):

> "viewed the plant as having exemplary recycle (when the contractor's sheets do not mention recycle) and evaporation (in an area where precipitation is twice the evaporation rate)."

After mentioning other matters the letter said:

> "We hope that you will agree that the issues as to the record and the basis for the sodium silicate guidelines and standards of performance are matters better resolved by administrative than by judicial consideration."

We agree with counsel. The strained effort in the EPA brief to justify the agency actions leaves us in a state of extreme confusion. We have examined every record reference made by EPA. They are cryptic, mystic, and enigmatic. If there is to be any worthwhile judicial review of agency action, that action must be presented and supported in a manner capable of judicial understanding. It is enough to say that EPA has not shown that its technology is available, achievable, or demonstrated. The mandates of the Act have not been obeyed.

Sections 415.192, 415.193, and 415.195 are set aside and remanded for reconsideration.

(10) Sulfuric Acid—40 C.F.R. Part 415, Subpart U.

This subpart relates to discharges of pollutants from the production of sulfuric acid in single and double adsorption plants. The regulations provide for no discharge of pollutants by existing plants at both the 1977 (§ 415.212) and 1983 (§ 415.213) dates and by new sources (§ 415.215).

Industry objects to the inclusion of plants using certain processes. On January 31, 1975, EPA amended the applicability section (§ 415.210) of this subcategory. See 40 Fed. Reg. 5523. We are not told what is the effect of the amendment. Without this knowledge we cannot evaluate the regulations as they now read.

Also we have the problem of the definitions of "process waste water" and "process waste water pollutants." These are found in § 401.11(q) and (r) which we have set aside and remanded. EPA should assess the effect of the definitions on sulfuric acid plants. Because we do not know what will be the result of changed definitions on the no discharge requirements of §§ 415.212 and 415.213, those regulations are set aside and remanded for reconsideration.

Industry and EPA are in apparent agreement that single adsorption plants which are required to install tail gas scrubbers should not be held to the zero discharge requirement (Briefs in Nos. 74-1261 etc., EPA at 126 and Industry reply brief at 97). EPA says that such a plant would be entitled to a variance from the 1977 requirement and that the variance may be given by the permit issuer under the provision of § 415.212. Industry points out that the variance procedure is not applicable to the 1983 requirement. It would appear that the variance and review provisions of § 301(c) and (d) of the Act furnish adequate protection to Industry. Because EPA must reconsider the zero discharge provisions, it might be that the solution is to exclude the plants in question from regulation coverage. On remand EPA should consider this problem.

Industry raises two points in connection with the no discharge requirement for new sources. The first refers to the definition of process waste water which has been discussed in connection with other categories. With relation to sulfuric acid EPA concedes (Brief in Nos. 74-1296 etc. at 61) that "no discharge of contaminated cooling water is practicable for all plants at all times." The second relates to the EPA redefinition of the applicability of the sulfuric acid category. In this regard our statements in connection with existing sources apply also to new sources.

Sections 415.210, 415.212, 415.213, and 415.215 are set aside and remanded for reconsideration.

(11) Titanium Dioxide—40 C.F.R. Part 415, Subpart V.

This subpart originally related to discharges of pollutants from the production of titanium dioxide by the sulfate process and by the chloride process. For each process the regulations specify permissible discharges for all three steps. §§ 415.222, 415.223, and 415.225.

A 1975 amendment to the applicability clause, 40 Fed. Reg. 5523-24, removed applicability "to wastes resulting from discharges from production by processes in which beneficiation of raw ilmenite ore and chlorination are inseparably combined in the same process step." We understand that the amendment affects the chloride process and we are not told what will be its effect. Industry makes the reasonable request that the court remand the chloride process regulations insofar as they apply to "a process that combines beneficiation of low grade ilmenite ore and chlorination." Industry reply brief in Nos. 74-1261 etc. at 163. The request is granted.

With regard to the sulfate process, the charges and countercharges of the parties are more theatrical than informative. The discharge of pollutants from plants using the sulfate process presents a serious problem. This fact does not excuse EPA from failing to disclose and articulate, in an understandable manner, its course of inquiry, anal-

ysis and reasoning. EPA relies on after-the-fact rationalization and argument in its brief. The brief in turn places heavy reliance on, and six times cites for record support, "App. 2278." This is a reproduction of a document which was prepared by some undisclosed person and which contains penciled notes made by an unknown writer. The cryptic allusions mean nothing to us.

The technology used by EPA to justify its regulations is not shown to be in use at any plant, either existing or pilot. EPA's continued reference to the American Cyanamid plant is unimpressive. That plant is not using the technology on which EPA relies, and it intends to use a proprietary treatment process which it refuses to disclose because of a confidentiality agreement. EPA has not demonstrated that the technology claimed to support its regulations is either available, practicable, economically achievable, or demonstrated. In the circumstances it is not necessary to explore the lengthy, technical arguments of the parties relating to costs and energy requirements.

Sections 415.220, 415.222, 415.223, and 415.225 are each set aside and remanded for reconsideration.

IV

The following regulations, all contained in 40 C.F.R., are severally set aside and remanded for reconsideration in the light of this opinion:

General

401.11(i)—Definition of "effluent limitation."

401.11(q)—Definition of "process waste water."

401.11(r)—Definition of "process waste water pollutants."

Chlorine

415.63—1983 step.

Hydrochloric Acid

415.72—1977 step.

415.73—1983 step.

415.75—New sources.

Hydrofluoric Acid

415.82—1977 step.

415.83—1983 step.

415.85—New sources.

Hydrogen Peroxide

415.93—1983 step.

415.95—New sources.

Nitric Acid

415.102—1977 step.

415.103—1983 step.

415.105—New sources.

Sodium Carbonate

415.152—1977 step.

415.153—1983 step.

415.155—New sources.

Sodium Dichromate

415.173—1983 step.

Sodium Metal

415.182—1977 step.

415.183—1983 step.

415.185—New sources.

Sodium Silicate

415.192—1977 step.

415.193—1983 step.

415.195—New sources.

Sulfuric Acid

415.210—Applicability.

415.212—1977 step.

415.213—1983 step.

415.215—New sources.

Titanium Dioxide

415.220—Applicability.

415.222—1977 step.

415.223—1983 step.

415.225—New sources.

JUDGMENT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 74-1261

E. I. DUPONT DE NEMOURS & CO.,

Petitioner,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amicus Curiae.

ALLEGHENY POWER SYSTEM, INC., ET AL,

Amicus Curiae.

NEW JERSEY ZINC COMPANY,

Amicus Curiae.

AMERICAN PETROLEUM INSTITUTE AND ELEVEN MEMBER COMPANIES. (ASHLAND OIL, INC.; CONTINENTAL OIL COMPANY; EXXON CORP.; GULF OIL CORP.; PHILLIPS PETROLEUM COMPANY; SHELL OIL CO.; STANDARD OIL CO. OF CALIFORNIA; STANDARD OIL CO. OF OHIO; SUN OIL CO. OF PENNSYLVANIA; TEXACO, INC.; UNION OIL OF CALIFORNIA)

Amicus Curiae.

RMI, INC.

Amicus Curiae.

versus

RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency,

Respondent.

NATURAL RESOURCES DEFENSE COUNCIL,

Amicus Curiae.

On Petition For Review Of An Order Of The Environmental Protection Agency

THIS CAUSE *came on to be heard upon the petition of* E. I. duPONT de NEMOURS & Company, *for review of*

an order issued against it by the Environmental Protection Agency on March 4, 1974; upon a certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, *it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the following regulations, all contained in 40 C.F.R., are severally set aside and remanded for reconsideration in light of this opinion.*

General

401.11(i)—Definition of "effluent limitation."

401.11(q)—Definition of "process waste water."

401.11(r)—Definition of "process waste water pollutants."

Chlorine

415.63—1983 step.

Hydrochloric Acid

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415.102—1977 step.

415.103—1983 step.

415.105—New sources.

Sodium Carbonate

415.152—1977 step.

415.153—1983 step.

415.155—New sources.

Sodium Dichromate

415.173—1983 step.

Sodium Metal

415.182—1977 step.

415.183—1983 step.

415.185—New sources.

Sodium Silicate

415.192—1977 step.

415.193—1983 step.

415.195—New sources.

Sulfuric Acid

415.210—Applicability.

415.212—1977 step.

415.213—1983 step.

415.215—New sources.

Titanium Dioxide

415.220—Applicability.

415.222—1977 step.

415.223—1983 step.

415.225—New sources.

/s/ WILLIAM K. SLATE, II
Clerk

Supreme Court, U. S.
FILED
MAY 24 1976
MICHAEL RODAK, JR., CLERK

No. 75-1473

In the Supreme Court of the United States

OCTOBER TERM, 1975

E.I. DUPONT DE NEMOURS AND COMPANY, ET AL., PETITIONERS

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1473

E.I. DUPONT DE NEMOURS AND COMPANY, ET AL., PETITIONERS

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Respondent agrees that the Court should grant the petition for a writ of certiorari in this case. The questions presented are identical to those raised in *E.I. duPont de Nemours & Co.* v. *Train (duPont I)*, No. 75-978,[1] petition for a writ of certiorari granted April 19, 1976. If, as we suggest, the Court grants the petition here and consolidates the case with *duPont I*, this will facilitate consideration of all of the issues concerning the authority of the

---

[1]In our response to the petition in *duPont I*, we agreed that a writ of certiorari should be granted. We noted, however, that it might be unnecessary for the Court to reach the merits of the case since the court of appeals had confined its decision solely to the issue of its jurisdiction. In *duPont II*, the court fully addressed the merits of the case, so that all issues are now ripe for review by this Court.

Administrator of the Environmental Protection Agency to issue effluent limitations governing discharges from existing sources of pollution pursuant to Sections 301 and 304 of the Federal Water Pollution Control Act, as added in 1972, 86 Stat. 844, 850, 33 U.S.C. (Supp. IV) 1311 and 1314.[2]

With this memorandum, we are simultaneously filing a cross-petition in this case challenging the court's disposition of petitioner's attack on the new source standards of performance promulgated under Section 306 of the Act, 33 U.S.C. (Supp. IV) 1316.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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[2]Since the granting of the petition in *duPont I*, two other courts of appeals have held that regulations of the Administrator establishing effluent limitations guidelines are directly reviewable in the courts of appeals. *Hooker Chemicals & Plastic Corp., et al.* v. *Train*, C.A. 2, No. 74-1687, decided April 28, 1976 (guidelines for the phosphate industry); and *American Frozen Food Institute* v. *Train, etc.* C.A.D.C., Nos. 74-1464, 74-1513 and 74-1840, decided May 11, 1976 (guidelines for the potato processing industry).

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1473 and 75-1705

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners (and Cross-Respondents),

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Respondent (and Cross-Petitioner).

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONERS (AND CROSS-RESPONDENTS)

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JULY 16, 1976

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In the Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1473 and 75-1705

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners (and Cross-Respondents),

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Respondent (and Cross-Petitioner).

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR PETITIONERS (AND CROSS-RESPONDENTS)[1]

Opinions Below

The decision of the court of appeals (*"du Pont II"*; App. 253; [2] Pet. in No. 75-1473, Appendix A) was the second opinion

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[1] Petitioners in No. 75-1473 and Cross-Respondents in No. 75-1705 are E. I. du Pont de Nemours and Company, Olin Corporation, FMC Corporation, American Cyanamid Company, Monsanto Company, The Dow Chemical Company, Allied Chemical Corporation, Hercules Incorporated, Union Carbide Corporation, Stauffer Chemical Company, Diamond Shamrock Corporation, PPG Industries, Incorporated, BASF Wyandotte Corporation, Cities Service Company, and N L Industries, Incorporated.

[2] This brief complements the brief being filed concurrently in No. 75-978, the companion case in this Court relating to the first decision by the court of appeals in the consolidated proceedings in that court.

Throughout this brief, as in the brief being filed simultaneously in No. 75-978, citations will be to the Single Appendix in No. 75-978 and will be designated "App. ___." An exhibit volume of the Appendix has also been prepared, comprising a reproduction of two lengthy EPA-issued documents which are part of the administrative record in this case. This exhibit volume will be cited as "Ex. R. ___." In addition, in this brief citation will be made

by that court in a consolidated proceeding. It has not yet been officially reported. It is unofficially reported at 8 E.R.C. 1718.

The first opinion of the court of appeals in the consolidated proceeding (*"du Pont I"*; App. 240; Pet. in No. 75-978, Appendix A) is reported at 528 F.2d 1136.

Jurisdiction

The judgment of the court of appeals in its second decision (App. 287-289; Pet. in No. 75-1473, Appendix A at 35a–37a) was entered on March 10, 1976. The petition for writ of certiorari in No. 75-1473 respecting the decision was filed on April 13, 1976. The cross-petition for writ of certiorari (No. 75-1705) was filed on May 24, 1976. Both the petition numbered 75-1473 and the cross-petition numbered 75-1705 were granted by this Court on June 21, 1976.

Also on June 21, 1976, this Court denied petitioners' motion to consolidate the cases numbered 75-1473 and 75-1705 with No. 75-978. The petition for writ of certiorari in No. 75-978 had been granted on April 19, 1976. The Court did consolidate Nos. 75-1473 and 75-1705, and ordered the combined cases to be argued "in tandem with No. 75-978."

Petitioners are filing this brief simultaneously with the filing of the opening brief in the companion case, No. 75-978.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented[3]

1. Whether the Federal Water Pollution Control Act, as amended, provides that regulations governing wastewater

to certain portions of the original record on file with the Court which have not been reproduced in the Appendix. Where those portions of the record stem from the certified index of the administrative record filed by EPA with the court of appeals, the citation will appear as "R. ___." Such citations will reflect EPA's original pagination of the administrative record. A complete copy of the administrative record is on file with the Clerk of this Court.

[3] Questions 1, 2, and 3 are also presented to this Court in No. 75-978. Question 4 was added by the cross-petition, No. 75-1705.

effluent discharges from existing plants be issued in the form of

(a) "effluent limitations" based upon an authorization said to be implied from Section 301(b) of the Act, or

(b) "guidelines for effluent limitations" in compliance with the express command of Section 304(b) of the Act.

2. Whether district courts or courts of appeals have initial jurisdiction to review regulations issued by the Administrator of the Environmental Protection Agency under the Federal Water Pollution Control Act, as amended, governing wastewater effluent discharges from existing plants.

3. Whether when "the Act is not clear" in conferring initial jurisdiction to review regulations for existing plants upon the courts of appeals rather than in providing the normal review in the district courts, the statute should be construed on grounds of practicality to confer such initial jurisdiction on the courts of appeals.

4. Whether standards of performance promulgated under Section 306 of the Act to control effluent discharges from sources constructed after the publication of proposed standards ("new sources") are "presumptively applicable" to rather than always binding on such sources, such that the Agency must provide a "safety valve procedure" enabling individual new sources to obtain a variance from the standards upon a proper factual showing.[4]

Statutes And Regulations Involved

1. *The Federal Water Pollution Control Act, as amended.* Sections 101, 301, 302, 304, 306, 307, 309, 401, 402, 502, 505 and 509 of the Act (33 U.S.C. §§ 1251, 1311, 1312, 1314, 1316, 1317, 1319, 1341, 1342, 1362, 1365 and 1369) are set forth in

[4] The reference to a "safety valve procedure" is taken from *WAIT Radio* v. *Federal Communications Commission*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (1968). The court of appeals in the present case used the term "escape mechanism". (App. 263.)

Appendix A to the opening brief in the companion case, No. 75-978. (The Appendices are separately bound.)

2. *"Effluent Limitations Guidelines" and "Standards Of Performance For New Sources" for the Inorganic Chemicals Manufacturing Point Source Category.* The regulations issued by the Administrator which govern the wastewater effluent discharges from existing plants and from new sources in the Inorganic Chemicals Manufacturing Point Source Category are found at 40 C.F.R. Part 415, *added by* 39 *Fed. Reg.* 9611-9635 (March 12, 1974). They are set forth in Appendix B to the opening brief in No. 75-978.

3. *"Effluent Guidelines and Standards—General Provisions."* The regulations issued by the Administrator to provide general provisions applicable to effluent guidelines for existing sources and to standards of performance for new sources for the various industry categories including the inorganic chemicals category are found at 40 C.F.R. Part 401, *added by* 39 *Fed. Reg.* 4531-4533 (February 4, 1974). They are set forth in Appendix C to the opening brief in No. 75-978.

Statement Of The Case

Case No. 75-1473 raises issues identical to those posed in No. 75-978, but on a different jurisdictional base than that of No. 75-978. Each case concerns the Environmental Protection Agency's regulations for wastewater effluents from existing facilities in the inorganic chemicals industry. They present issues of the proper construction to be accorded key sections of the Federal Water Pollution Control Act, as amended ("the Act"), 33 U.S.C. §§ 1251 *et seq.*

The divergent jurisdictional postures of the cases arise because the pending issues of statutory construction involving the effluent regulations for existing plants bear on the special provisions in the Act prescribing jurisdiction in the courts of appeals for review of certain regulatory actions of the Administrator of the Environmental Protection Agency ("EPA" or "Administrator" or "the Agency").

Notwithstanding the presence of jurisdictional issues, the heart of the cases consists of the substantive issues of the proper construction to be accorded the statutory provisions governing EPA's issuance of effluent guideline regulations. Because these related cases reflect the two alternative jurisdictional predicates, there is no bar or impediment to the Court's consideration of the substantive statutory-construction issues.

No such jurisdictional issue arises in conjunction with the question of statutory construction respecting the new source standards presented in No. 75-1705.

The opening brief in the companion case, No. 75-978, contains a comprehensive discussion of the statutory framework, of the administrative proceedings which culminated in EPA's promulgation of the regulations at issue here, and of the prior judicial proceedings in these cases. See Opening Brief in No. 75-978, at 4-25.

This brief will discuss the questions presented in a different order than that set out *supra*. The discussion in this brief will open with, and will focus on, the issue presented by the cross-petition (No. 75-1705) relating to EPA's new-source standards. Petitioner's arguments respecting EPA's regulations for existing plants will then be briefly noted but not discussed in detail because the questions presented are identical to those in No. 75-978 and are discussed comprehensively in the companion opening brief in No. 75-978.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT EPA'S NEW SOURCE STANDARDS SHOULD CONTAIN A "SAFETY VALVE"

The court of appeals correctly ruled that EPA's new source standards should contain a "safety valve procedure" enabling a new source to obtain, upon an appropriate factual showing, a discharge permit different from such a standard. (App. 263.) Provisions of the Act, as well as judicial doctrines of construction for statutes providing agencies with rulemaking authority,

support a "safety valve procedure" linked to special facts in particular cases.

A. Provisions Of The Act Support A "Safety Valve Procedure"

The Act's provisions direct that EPA promulgate regulations for existing plants in the form of "guidelines" which by their very nature should contain mechanisms for providing a flexible application of those regulations to the diverse situations at existing plants. As discussed in the opening brief in No. 75-978, EPA should issue guideline regulations with a range of effluent values and with specified factors to guide the selection of a number from the range for a particular plant. Thus, there is no need for a special "safety valve procedure" in EPA's guideline regulations for existing plants. Section 306 does not, however, call for such flexible guideline regulations. It requires EPA to issue "Federal standards of performance for new sources", not guidelines. (§ 306(b)(1)(B), 33 U.S.C. § 1316 (b)(1)(B).)[5] Consequently, as the court of appeals ruled, to accord with the statutory scheme governing discharge permits for new sources, a safety valve procedure must be recognized and built into the standards.

EPA's new source standards must reflect a generally defined level of wastewater control technology, *i.e.*,

> "the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including where practicable, a standard permitting no discharge of pollutants."
>
> (§ 306(a)(1).)

[5] EPA as a result has a greater degree of control over State permit authorities where new plants are involved. The statutory system is roughly comparable to that found in the Clean Air Act, as amended, and described in *Hancock* v. *Train*, ___U.S.___, 44 U.S.L.W. 4767, 4768 n.6 (U.S., June 7, 1976), as follows: "The range of a State's initiative in meeting its primary responsibility to assure air quality is somewhat greater for existing sources of air pollution, such as those involved in this case, than for 'new sources'."

The Administrator was charged with issuing new source standards at least for each of 27 general industry categories listed in Section 306(b)(1)(A), and with doing so by one year and seven months from enactment of the 1972 Amendments. In setting the standards, EPA may "distinguish among classes, types, and sizes" within the 27 general categories. The statute directs the Agency to take into consideration three factors in issuing the standards: (1) the cost of achieving the effluent reduction, (2) non-water quality environmental impacts, and (3) energy requirements. (§ 306(b)(1)(B).) The standards are applicable only to "new sources", specifically defined as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source." (§ 306(a)(2).)[6] Section 306(b)(1)(B) provides that the Administrator shall revise the new source standards "from time to time." The legislative history suggests that Congress believed new sources could attain discharge levels more easily and at less cost than existing plants already in place which must be retrofitted with wastewater control technology. See H. Rep. No. 92-911, 92d Cong., 2d Sess., at 110 (1972), 1 Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 797 (1973) (hereinafter "*Leg. Hist.*").[7]

[6] Under Section 306(d) certain newly constructed facilities will have a ten-year period during which effluent requirements may not be changed:

> "[A]ny point source [not just a new source] the construction of which is commenced after the date of enactment of the [1972 Amendments] . . . and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction. . . ."

Notably, Section 306(d) applies to all newly constructed facilities, not just those which are "new sources" within the meaning of the Act. And, to obtain the ten-year certainty period, the newly-constructed facility must comply with "*all* applicable standards of performance" (emphasis added). For any given new plant, there may be no applicable new source standard, or alternatively, there may be several applicable new source standards if the plant is designed to produce multiple products.

[7] The Conference Committee deleted a provision which would have extended the application of new source standards to cover a modification of an existing source. See S. Rep. No. 92-1236, 92d Cong., 2d Sess., at 127 (1972) (Conference Report), 1 *Leg. Hist.* at 310.

Section 306(e) provides that it is unlawful for a new source to be operated in violation of a new source standard. Direct enforcement of the new source standards is possible outside the permit context. Under Section 309, EPA may bring direct enforcement actions for a violation of a new source standard, and under Section 505 citizens similarly may bring private civil actions to enjoin such violations. (See § 505(a), (b) (exception clause before the last sentence), and (f)(3).) There are no provisions for direct enforcement of the guideline regulations comparable to Sections 306(e), 309, and 505 respecting the new source standards.

Under the Act, however, new source standards are not always to be applied by rote. The statutory provisions pertaining to permits contemplate exceptions, by providing that permit proceedings may result in limitations in a permit for a new source which are different from (either more or less stringent) and which override the new source standard. Section 402(k) does not leave this possibility to inference. It explicitly provides that compliance with a permit "shall be deemed compliance, for purposes of sections 309 and 505, with sections . . . 306 . . . [etc.]." (§ 402(k), 33 U.S.C. § 1342(k).) A "safety valve procedure" in the standards thus simply would recognize the effect of Section 402(k)[8] and would provide a specified means for establishing limitations in permits for new sources which are different from the new source standards themselves.

Congress was able to provide for limitations in permits which overrode the new source standards because a full factual inquiry into the new source's circumstances will be made in the permit proceedings. In issuing permits for new sources, EPA arguably is not exempted from a duty to comply with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"). Accordingly, in conjunction with permit proceedings for new sources EPA may be required to

[8] In addition, the specific direction to the Administrator in Section 306(b)(2) to consider the type of process employed and whether it be continuous or batch is a recognition that single-number standards without deviation were not contemplated since batch processing is inherently more variable than continuous processing.

prepare an environmental impact statement under Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C).[9] In any event, the permit proceedings will include an environmental inquiry and assessment. The permit proceedings for new sources thus can provide a good factual basis for adjusting a new source standard to obtain particular limitations for an individual plant.

B. Judicial Doctrines Of Construction For Statutes Authorizing Agency Rules Call For Use Of "Safety Valves" Linked To Special Facts In Particular Cases

A "safety valve procedure" is a customary concomitant to agency rules of general application. Well established judicial doctrines of construction call for use of "safety valves" linked to special facts in particular cases, where statutes provide agencies with authority to establish such rules of general applicability. *WAIT Radio* v. *Federal Communications Commission*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (1968). See also *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972). The present case is not the extraordinary situation where there can be no safety valve and the general rule must inevitably and irrevocably be applied by rote. To the contrary, as just discussed, the Act itself contemplates that limitations different from a new source standard may be set in permit proceedings.

C. The Court Of Appeals Took Proper Account Of The Statutory Scheme In Instructing EPA To Establish "Presumptively Applicable" New Source Standards Containing A Safety Valve Procedure

The court of appeals concluded that EPA's new source standards were "presumptively applicable" to rather than always binding on such sources, such that the Agency must provide a

[9] See § 511(c)(1), 33 U.S.C. § 1371(c)(1); see also the opening brief in No. 75-978 at 8 & n.11.

NEPA applies only to "Federal action." See, *e.g.*, 42 U.S.C. § 4332(2)(C); *Flint Ridge Development Co.* v. *The Scenic Rivers Ass'n of Oklahoma*, ___ U.S ___, 44 U.S.L.W. 4954 (U.S. June 24, 1976). Accordingly, if a State has NPDES permit authority, it is not subject to NEPA. State law would determine whether or not a State permit-issuing authority would prepare a special environmental assessment or impact statement in conjunction with

safety valve procedure enabling individual new sources to obtain limitations in permits different from the standards upon a proper factual showing. (App. 263.) This formulation by the court of appeals accords precisely with the statutory scheme.

Where a new source does not have a permit, the Act contemplates that the new source standard will be applicable directly to the source. (See §§ 306(e), 309, and 505.) Necessarily then, a standard must be "presumptively applicable" to provide for the possibility of direct enforcement where there is no permit.

Also, a "presumptively applicable" standard provides an appropriate starting point for permit proceedings. The permit proceedings for new sources, conducted in conjunction with an environmental review and assessment, provide a good basis for examining the factual circumstances at the particular plant or facility involved. Given the starting point provided by the standard, and coupled with the opportunity for a detailed factual inquiry provided by the proceedings and the NEPA review, limitations in the new source's discharge permit can be developed which fit the new source's particular situation. Pursuant to Section 402(k), these limitations in the new source's permit override for enforcement purposes and otherwise supplant the new source standards themselves, for the particular new source. Thus, a "safety valve" clause in the new source standards, linked to special facts in particular cases, is required to carry out the statutory scheme.[10]

In sum, the court of appeals was correct in its holding that EPA had not followed the statute in asserting that its new

action on an application for a new source discharge. In acting on the permit application, a State permit-issuing authority would in any event conduct proceedings which would provide public notice and an opportunity to be heard on the application itself.

[10] Permit-issuing authorities in the States otherwise may believe themselves bound to follow and apply an applicable new source standard no matter how absurd the result may be in a particular case. Also, EPA thus far has not acknowledged even the possibility that under the Act its new source standards may be modified in the sense that permit proceedings may provide a basis in fact for establishing different limitations in a permit.

source standards had to be applied by rote in permit proceedings. Because of the interplay of the enforcement sections (§§ 306(e), 309, and 505) with Section 402(k), the Act provides that in the absence of a permit a new source standard is applicable and enforceable directly. However, permit proceedings can produce limitations for a new source which are different from an otherwise applicable new source standard, if a factual predicate for the different limitations is established.[11] The permit proceedings may be conducted either by State or by Federal permit authorities, depending upon whether the pertinent State has an approved permit program.

II. SECTION 304(b) OF THE ACT MANDATES THAT EPA ISSUE ITS EFFLUENT REGULATIONS FOR EXISTING PLANTS AS "GUIDELINES FOR EFFLUENT LIMITATIONS", SUCH THAT THESE GUIDELINE REGULATIONS MAY BE USED BY PERMIT AUTHORITIES TO ESTABLISH LIMITATIONS IN PERMITS FOR PARTICULAR PLANTS

As discussed in the opening brief in No. 75-978, under the statute EPA is obliged to issue effluent regulations for existing plants in the form of "guidelines for effluent limitations" under Section 304(b) of the Act, 33 U.S.C. § 1314(b). The statute further expressly specifies that these regulations are to be "two pronged", *i.e.*, they must "identify . . . the degree of effluent reduction attainable . . . and . . . specify factors to be taken into account in determining the control measures and practices to be applicable to point sources [individual plants or facilities]. . . ." (§ 304(b)(1).) EPA's regulations for existing plants do not comply with this mandate.

[11] One factual example of the need for a safety valve is provided by the record in the present case. EPA included in certain new source standards (*e.g.*, 40 C.F.R. § 415.95, Appendix B to the opening brief in No. 75-978, at 49b) a provision forbidding overflow from ponds except in a 25-year catastrophic rain event, which the court below correctly held required an infinitely expanding pond in an area of net rainfall. See the brief in No. 75-978, at 70. The permit process must be able to account for such different climatalogical situations at various new plants.

EPA elected to abandon Section 304(b) and has promulgated its existing-plant regulations in the form of single-number "limitations". The Agency asserts that such limitations must be "mechanically cranked" into discharge permits issued for all pertinent plants, despite the diversity of such plants. EPA's regulatory action has made it impossible for permit authorities in qualified States and in its own regional offices to administer a meaningful program for establishing and issuing discharge permits for existing plants, as Congress intended.

For a detailed discussion of these issues, the Court's attention is respectfully drawn to the opening brief in No. 75-978, at 30-85.

III. ORDINARILY, DISTRICT COURTS WOULD HAVE INITIAL JURISDICTION TO REVIEW EPA'S GUIDELINE REGULATIONS FOR EXISTING PLANTS, BUT THIS COURT SHOULD CONSTRUE THE ACT TO ALLOW COURTS OF APPEALS TO TAKE PENDENT JURISDICTION TO REVIEW GUIDELINE REGULATIONS WHERE THE PARTIES SEEK REVIEW OF CONCURRENTLY ISSUED NEW SOURCE STANDARDS

For the reasons stated in the opening brief in No. 75-978, at 94-96, Petitioners urge that this Court construe the Act to allow courts of appeals to take pendent jurisdiction to review guideline regulations where the petitioning parties seek review of new source standards issued concurrently in the same proceeding and on the same record.

Conclusion

This Court should affirm that portion of the court of appeals' decision in *du Pont II* which ruled that EPA's new source standards must contain a "safety valve procedure".

EPA's effluent regulations for existing plants do not comply with the statutory mandate of Section 304(b). If the Court

recognizes pendent jurisdiction in the court of appeals to review EPA's guideline regulations, the decision of the court of appeals in *du Pont II* respecting the nature and content of the guideline regulations should be reversed and remanded. If pendent jurisdiction is not recognized by this Court, the decision of the court of appeals in *du Pont II* as to the guideline regulations should be reversed such that further proceedings would be had in the district court.

Respectfully submitted,

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Nos. 75-1473 and 75-1705

In the Supreme Court of the United States

OCTOBER TERM, 1976

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL., PETITIONERS

v.

RUSSELL E. TRAIN, AS ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

RUSSELL E. TRAIN, AS ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75–1473

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v.

RUSSELL E. TRAIN, AS ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

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OPINION BELOW

The opinion of the court of appeals (A. 253–286)[1] is not yet officially reported.

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[1] "A." refers to the Appendix in No. 75–978. "App. Br." refers to the separate Appendices to Petitioner's Brief in No. 75–978.

JURISDICTION

The judgment of the court of appeals (A. 287–289) was entered on March 10, 1976. The petition for a writ of certiorari in No. 75–1473 was filed on April 13, 1976, and in No. 75–1705 on May 24, 1976. The petitions were granted on June 21, 1976 (A. 291, 292).[2] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

This brief discusses the following question:

Whether federal standards of performance promulgated under Section 306 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. V) 1316, to control effluent discharges from sources constructed after the date of proposal of the standards, are only "presumptively applicable" and must provide an "escape mechanism" enabling individual new sources to obtain a variance from the standards.[3]

[2] The court of appeals decided this case in two steps. The first decision (A. 240–251) ("*duPont I*") held only that the court of appeals rather than the district court had jurisdiction to review the actions of the Administrator of the Environmental Protection Agency challenged in No. 75–978. The second decision ("*duPont II*") decided the merits of petitioners' challenges (A. 253–286). The chemical companies, petitioners in both cases (Nos. 75–978, *duPont I;* No. 75–1473, *duPont II*) raised the jurisdictional and the substantive issues in both petitions. The government filed a cross-petition in *duPont II* (No. 75–1705), raising an additional question on the merits.

In granting the petition in *duPont I* and the petition and cross-petition in *duPont II*, the Court consolidated the petition and cross-petition in *duPont II*, and ordered that *duPont II* be argued *in tandem* with *duPont I* (A. 291, 292), but did not consolidate *duPont I* and *duPont II*.

The parties agreed that their opening briefs in *duPont I* would discuss both the jurisdictional and the substantive issues. The briefs in the consolidated cases (Nos. 75–1473 and 75–1705, *duPont II*) discuss only the issue raised by the government's petition in No. 75–1705.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp. V) 1251 *et seq.*, and Environmental Protection Agency regulations establishing general provisions for effluent limitations, 40 C.F.R. Part 401, and effluent limitations for the inorganic chemicals manufacturing point source category, 40 C.F.R. Part 415, are reproduced in the separate appendices to petitioners' brief in No. 75–978 (App. Br. 1a–42a, 1b–79b, 1c–9c).

STATEMENT

This case involves the Environmental Protection Agency's regulations for "new source" standards of performance for the inorganic chemicals manufactur-

[3] The questions duPont, *et al.*, present in No. 75–1473 are the same ones they present in No. 75–978. See note 2, *supra*. The questions involve the authority of the Administrator of the Environmental Protection Agency to establish effluent limitations for pollutants under Section 301(b) of the Act, and the jurisdiction of the courts of appeals to review both those limitations and the Administrator's guidelines for effluent limitations promulgated under Section 304(b), upon which the limitations are based. The Administrator's arguments on those issues are set forth in his brief in No. 75–978.

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ing industry, established under Section 306 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. V) 1316. The Administrator's brief in No. 75-978 describes in some detail the statutory scheme, many of the provisions involved and the proceedings in the present case. We discuss here only the statutory provisions and the administrative and judicial proceedings insofar as they relate to new sources of pollution.

1. *The pertinent statutory provisions.* Section 306 (a)(2) defines a "new source" as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." Section 306(a)(3) defines "source" as "any building, structure, facility, or installation from which there is or may be the discharge of pollutants."

Section 306(b)(1)(A) directs the Administrator to publish, within 90 days after passage of the Act, a list of categories of industries for which new source standards are to be established: it lists 27 industries for which those standards are required, including the inorganic chemicals manufacturing industry. The Administrator published the list, including the inorganic chemicals manufacturing category, on January 16, 1973, 38 Fed. Reg. 1624.

Section 306(b)(1)(B) requires the Administrator to "publish regulations establishing Federal standards of performance for new sources within [the categories on the list published under subsection b(1)(A)]." Section 306(a)(1) provides that those standards must reflect:

> the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

In establishing the standards, the Administrator may "distinguish among classes, types, and sizes" (Section 306(b)(2)) within the general industrial categories and is required to consider three factors in establishing the standards: (1) the cost of achieving the effluent reduction, (2) non-water quality environmental impacts, and (3) energy requirements. Section 306(b)(1)(B).

Once new source standards are effective, it is "unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." Section 306(e), 33 U.S.C. (Supp. V) 1316(e).

Section 306(d) provides that no more stringent standard may be imposed on plants that are constructed in compliance with these standards of performance for the 10 years following their completion.[4]

[4] If the plant is depreciated or amortized on the accelerated method permitted under Sections 167 and 169 of the Internal Revenue Code (26 U.S.C.), the prohibition against imposition of a more stringent standard applies during the period of such depreciation or amortization.

2. *The facts of this case.* The Administrator promulgated new source standards under Section 306 for the inorganic chemicals manufacturing industry in the same proceeding as the effluent limitations for existing sources described in the Administrator's brief in No. 75-978. See, *e.g.*, 40 C.F.R. 415.65, 415.75, 415.85 (Br. App. 35b, 39b, 43b). See Resp. Br., No. 75-978, pp. 13-21.[5] Within the 90 days allowed by Section 509(b)(1), 33 U.S.C. (Supp. V) 1369(b)(1), 15 firms manufacturing inorganic chemicals (Pet. Br., Nos. 75-1473 and 75-1705, p. 1, n. 1) sought review of the standards in the United States Court of Appeals for the Fourth Circuit. The case involving the new source standards was briefed and argued simultaneously with that involving the industry's challenges to the existing source regulations.[6]

The court of appeals held, with respect to both existing and new source regulations, that they are "presumptively applicable," but that any particular plant may rebut the presumption as applied to it (A. 262).[7] The court noted that both the Act and the

[5] The regulations were published in proposed form on October 11, 1973, 38 Fed. Reg. 28174 *et seq.* After a comment period, the regulations were promulgated in final form on March 12, 1974. 39 Fed. Reg. 9612 *et seq.*; 40 C.F.R. Part 415.

[6] While the parties are in disagreement over the proper forum—the district courts or the courts of appeals—to review challenges to the existing source regulations, they agree that jurisdiction to review the new source regulations is exclusively in the court of appeals, under Section 509(b)(1)(E).

[7] The regulations establishing effluent limitations for existing sources, *e.g.*, 40 C.F.R. 415.62, 415.72, 415.82 (App. Br. 31b, 37b, 40b), reflect a two-step program under Section 301(b), 33 U.S.C. (Supp. V) 1311(b). By 1977, existing sources must achieve compliance with effluent limitations based on "application of the best practicable control technology currently available." By 1983, existing sources must comply with effluent limitations requiring "application of the best available technology economically achievable." The Administrator may modify the 1983 level limitations for a particular "existing source" if such modification "(1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Section 301(c). The Administrator provided by regulation a similar variance from the 1977 level limitations. The owner or operator of a particular "existing source" seeking a variance for 1977 must demonstrate that there are factors affecting his ability to meet the limitations that are "fundamentally different" from the factors considered by the Administrator in promulgating the regulations. See, *e.g.*, 40 C.F.R. 415.62, 415.72, 415.82. See also Resp. Br. No. 75-978 at p. 57.

Administrator's regulations allow individual plants to obtain variances from the *existing* source regulations if they satisfy certain conditions (*ibid.*). See n. 7, *supra*. Although neither the Act nor the regulations expressly authorize variances for new sources, and the industry did not claim that it is entitled to them, the court of appeals nevertheless held that its rule of "presumptive applicability applies to new sources as well as existing sources," and directed the Administrator to "come forward with some limited escape mechanism for new sources" (A. 263). The Administrator's petition challenges only the part of the court of appeals' remand order that requires the Administrator to provide an "escape mechanism" for new sources.

SUMMARY OF ARGUMENT

The language and statutory scheme of the Federal Water Pollution Control Act Amendments of 1972,

as well as the Amendments' legislative history, show that Congress did not require the Administrator to establish "a limited escape mechanism" for plants to be built after he establishes effluent limitations ("federal standards of performance") for new sources under Section 306. The absence of such a requirement from Section 306 is itself convincing evidence that such a variance procedure is not mandatory, especially when contrasted with provisions that allow, but do not require, the Administrator to grant variances in other contexts. See, *e.g.*, Section 301(c), governing variances from the 1983 level of effluent limitations for existing sources.

There is no reason to provide an "escape mechanism" for plants not yet constructed. In the case of existing sources, a particular plant may face unique circumstances not considered by the Administrator in promulgating regulations of general applicability. A new plant, however, can be designed and equipped to utilize from its inception the best available pollution control technology, as Congress provided in Section 306. Thus, new sources must be built to comply with new source standards, or not be built at all. Indeed, Congress rejected a provision providing for even limited variances from the new source standards. It insisted upon rigorous uniform standards so that plants would use the best available demonstrated control technology no matter where located, and would not be encouraged to migrate to jurisdictions with less stringent requirements.

To the extent that flexibility is required in new source standards, Congress provided for it by authorizing the Administrator to vary the standards by distinguishing among the subcategories of the industry on the basis of differences reflecting products, processes, scale of operation, etc. The Administrator's regulations make these distinctions.

Petitioners' contention that the national standards established by the Administrator may be varied in individual permit proceedings does not follow either from the enforcement provisions of the Act (Sections 306(e), 309 and 505) or from Section 402(k), which provides that, for enforcement purposes, compliance with a permit is deemed compliance with Section 306. Direct enforcement of new source standards was necessary to deal with the case in which a new source began operation without first obtaining a permit. The purpose of Section 402(k) is simply to insure that, once a point source has obtained a permit, subsequent changes in effluent limitations will not place the permit holder in violation of the Act.

ARGUMENT

THE FEDERAL WATER POLLUTION CONTROL ACT DOES NOT REQUIRE VARIANCES FROM THE ADMINISTRATOR'S STANDARDS OF PERFORMANCE FOR NEW SOURCES

A. THE LANGUAGE AND STATUTORY SCHEME SHOW THAT CONGRESS DID NOT INTEND TO REQUIRE ANY VARIANCES FROM THE ADMINISTRATOR'S NEW SOURCE STANDARDS

Section 306(b) of the Act requires the Administrator to establish "Federal standards of performance for new sources within" each industrial category (including 27 mandatory ones) for which he determines to establish such standards. "Standard of per-

formance" is defined as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants" (Section 306 (a)(1)). In establishing standards of performance, the Administrator is required to consider "the cost of achieving such effluent reduction, and any nonwater quality environmental impact and energy requirements" (Section 306(b)(1)(B)).

Section 306(e) makes it unlawful, after those standards of performance have been established, "for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source."

Under the Act, "it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms" (*Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board*, No. 74–1435, decided June 7, 1976, slip op. 4–5). Section 402(a)(1) and (b)(1)(A) require that all permits insure that the discharge of pollutants they sanction will meet all "applicable requirements under sections * * * 306 * * *."

There is nothing in either Section 306 or Section 402 which indicates, or even suggests, that Congress did not intend what it said—that new sources are to operate in compliance with the Administrator's stand-

ards of performance. There is no indication that Congress intended to make those standards only "presumptively applicable" or to require a "limited escape mechanism" (A. 262, 263) which the Administrator must provide to permit exceptions to the standards to meet the problems of particular plants.[8]

The absence from Section 306 of any requirement that the Administrator provide variances or exceptions for individual point sources is in sharp contrast to other sections of the Act that expressly permit such waivers.[9] For example, Section 301(c) permits the Administrator to "modify the requirements" established under Section 301(b)(2)(A) for effluent limitations to be achieved by July 1983 for "any point source for which a permit application is filed after July 1, 1977," if he finds that "such modified requirements

[8] No other court of appeals that has considered the new sources standards has adopted this requirement. See *Hooker Chemical and Plastics Corp.* v. *Train*, 537 F. 2d 639 (C.A. 2); *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F. 2d 1027, 1057–1060 (C.A. 3); *CPC International, Inc.* v. *Train*, 515 F. 2d 1032, 1043–1051 (C.A. 8). Cf. *American Frozen Food Institute* v. *Train*, C.A.D.C., No. 74–1464, decided May 11, 1976. The District of Columbia Circuit's approval of new source regulations in the latter case is less clear, because that court mistakenly assumed that the Environmental Protection Agency had provided by regulation for a variance applicable to the new source standards, as well as 1977 and 1983 existing source regulations (slip op. 68). In fact, however, the variance regulation is applicable only to the 1977 existing source regulations. See n. 7, *supra*, p. 6.

[9] There is a clear distinction between the court of appeals' holding that the Administrator must provide a variance procedure for new sources, and the general rule that agencies may provide for such variances. See, *e.g.*, *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 40–41; *Permian Basin Area Rate Cases*, 390 U.S. 747, 770–

(1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Similarly, Section 402(d)(3) authorizes the Administrator to "waive" "as to any permit application" the requirement in Section 402(d)(2) that a state cannot issue a permit if he notifies it of his objection; and Section 402(e) authorizes the Administrator, for any category of point sources, "to waive the requirements" of Section 402(d) that the state transmit to him copies of all permit applications.

The congressional intent not to require variances from the standards for new sources is further shown by Section 313 of the Amendments, 33 U.S.C. (Supp. V) 1323. That section authorizes the President, whenever he determines it to be in the paramount interest of the United States, to grant any federal facility a one-year extendable exemption from any state or federal water pollution control requirement. The President, however, may not grant an exemption "from the requirements of section 306 or 307 [governing toxic pollutants] of this Act." See *Environmental Protection Agency* v. *California ex rel. State Water Re-*

772. The Administrator has interpreted the statute as permitting but not requiring variances for existing sources. His regulations provide that he will grant a variance from effluent limitations for 1977 for existing sources when a discharger shows that "factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines" (see n. 7, *supra*, p. 6; *e.g.*, 40 C.F.R. 415.62, 415.72, 415.82). This provision was sustained in *Natural Resources Defense Council* v. *Environmental Protection Agency*, 537 F. 2d 642 (C.A. 2).

sources Control Board, No. 74–1435, decided June 7, 1976, slip op. 11–12, n. 23. If Congress did not permit the President to grant an exemption from the requirements of Section 306 for federal facilities, even where he determined that such exemption would be in the paramount interest of the United States, it certainly did not require the Administrator to grant exemptions from those requirements for non-federal sources of pollution on some less stringent basis.

The congressional determination to permit individual variances from effluent limitations for existing sources, but not for new sources, reflects significant differences between the two categories. An existing facility may have unique problems stemming from its particular technology, operating methods or equipment, that the Administrator could not consider in promulgating general standards for the entire industry. Variances are necessary to ensure that application of the general standards to existing plants that have those unique problems will not subject them to requirements which are demonstrably inappropriate for the particular facility. To impose such ironclad standards upon them would be unfair. It would also contravene the congressional intent to achieve, by 1977 and 1983, effluent limitations that shall require application of "the best practicable control technology currently available" and "the best available technology economically achievable," respectively.

No similar problem exists for new sources. Since those facilities have not yet been constructed, the

application of uniform standards to them cannot require them to make any changes in their existing technology, operations or property. Moreover, as Senator Muskie noted, in explaining the Conference Report on the bill to the Senate, "pollution control alternatives are available to a new source, which are not available to existing sources." Leg. Hist. 172.[10] A new plant can be designed and equipped to utilize from its inception the best available pollution control technology.

As we show in Point B below, Congress intended new sources of pollution to meet the exacting effluent limitations that the Administrator would promulgate for them. The standard Congress hoped to achieve for new sources was one "permitting no discharge of pollutants" (Section 306(a)(1)). The most effective way to accomplish that objective was by prohibiting any new source that did not meet those standards. That is precisely what Congress did when it required the Administrator to establish "Federal standards of performance for new sources within [each individual] category" he had established (Section 306 (b)(1)(B)), and made it unlawful "for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source" (Section 306(e)).

[10] Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (1973) (2 vols.) hereafter cited as Leg. Hist.).

B. The Legislative History of the 1972 Amendments Shows That Congress Intended the Federal Standards of Performance for New Sources To Be Uniform Within a Particular Industrial Class or Category and Therefore Not Subject to Variances for Particular Facilities

The legislative history of the 1972 Amendments shows that Congress recognized that the only effective way to reduce and ultimately to end pollution by new sources was to require all of them to meet the exacting standards that the Administrator would promulgate. As the House Committee Report on the bill stated (H.R. Rep. No. 92–911, 92d Cong., 2d Sess. 110 (1972); Leg. Hist. 797):

> In section 306, the Committee recognizes two of the most significant factors in the attainment of clean water. These factors are (1) the need to *preclude the construction of new sources* or the modification of existing sources *which use less than the best available control technology* for the reduction or elimination of the discharge of pollutants, and (2) the recognition of the significantly lower expense of attaining a given level of effluent control in a new facility as compared to the future cost of retrofitting a facility to meet stringent water pollution control measures. [Emphasis added.]

The Senate Committee Report similarly pointed out (S. Rep. No. 92–414, 92d Cong., 1st Sess. 58 (1971); Leg. Hist. 1476) that "maximum feasible control of new sources, at the time of their construction, is considered by the Committee to be the most effective and,

in the long run, the least expensive approach to pollution control." It stated (*id.* at 57–58; Leg. Hist. 1475–1476):

> the standards of performance for new source[s] * * * would require the achievement of the greatest degree of pollution reduction that can be achieved through the application of the best available effluent control technology * * *. Such a maximum use of available means to prevent and control water pollution is essential to the prevention of new pollution problems and the eventual attainment of the goal of no-discharge.

Congress also insisted upon rigorous uniform standards for new sources to prevent the weakening of pollution controls that would result if firms sought to avoid stringent limitations in one state by constructing new facilities in another state whose limitations were less exacting. As Congressman Clausen, a member of the House Committee, explained (Leg. Hist. 379):

> I have heard it said that H.R. 11896 would allow the industrial equivalent of legal forum shopping. This is ridiculous. If, for example, a factory in the State of Washington decided because of stringent water quality requirements in the State of Washington to move their factory to some other State, this would place the new factory under the requirements of section 306 for new sources. Thus, not only would the plant in the new location be required to meet local water quality standards but it would also have to meet new source performance standards which would be consistent with "best available

> demonstrated technology." You might say this would be like moving from the frying pan into the fire.

Another Committee member, Congressman Roe, stressed the same point (Leg. Hist. 579–580):

> Section 306 requires that new sources of water pollution be constructed to meet a standard that reflects the greatest degree of effluent reductions that can be achieved by the use of the best available, demonstrated control technology. If practicable, the standard would permit no discharge of pollutants. Each new plant or modification of an existing plant will be required to follow this standard. In other words, what we are saying is that if an industry threatens to leave an area because of its stringent requirements, it would be confronted with the requirement of meeting the 1981 goal immediately.

See also Leg. Hist. 263 and 1405.

Indeed, Congress rejected a provision providing for limited variances from the new source standards. The bills reported to both Houses contained a provision requiring the Administrator to grant a variance for any source that, as a result of modification, would be subject to the new source standards, upon finding that "the economic and social costs of implementing such standard bear no reasonable relationship to the social and economic benefits * * *." If he so found, the Administrator would have been required to adjust the standard for such source to "reflect the greatest degree of effluent reduction which the Administrator determines can reasonably be achieved by such

source."[11] This provision would have covered only those existing sources that became subject to the new source standards because of modification, and not new sources generally.

Congress, however, was unwilling to permit even this limited variance from new source standards; the provision was deleted in conference without explanation. Leg. Hist. 173. "[I]ts action strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200. Cf. *Train* v. *Colorado Public Interest Research Group, Inc.*, No. 74–1270, decided June 1, 1976, slip op. 15–20.[12]

[11] The full text of this provision, which was identical in the House and Senate bills, is as follows (Leg. Hist. at 993, 1626–1627):

"(C) Such standards of performance shall apply to all sources within such category, unless, upon application from an owner or operator of any source which as a result of modification is subject to this section, the Administrator determines, after public hearing, that the economic and social costs of implementing such standard bear no reasonable relationship to the social and economic benefits (including water quality objectives) to be obtained. Any such determination shall be accompanied by an appropriate adjustment of such standard for such source, which shall reflect the greatest degree of effluent reduction which the Administrator determines can reasonably be achieved by such source."

[12] The cases the Fourth Circuit cited (A. 263) do not support its conclusion that variance provisions are mandatory. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, upheld a provision of the car-service rules established by the Interstate Commerce Commission permitting exemptions from the requirements of the regulations. The provision was sustained under the "well established" principle that "an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances" (*id.* at 755). The Court did not suggest, however, that the Commission could have been required to provide such exemptions; it merely sustained the agency's discretionary authority to do so. *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F. 2d 375, 398–399 (C.A.D.C.), held only that regulations that cannot be met on a continual basis by a properly designed and operated source of pollution must provide some method to avoid the dilemma. That ruling, however, does not establish that variances must be provided from standards which new sources are able to meet. See *International Harvester Co.* v. *Ruckelshaus*, 478 F. 2d 615, 641 (C.A. D.C.).

C. The Act and the Regulations Provide Any Necessary Flexibility in the New Source Standards To Reflect Differences in Operations and Facilities Within the Industry.

Congress recognized in the 1972 Amendments that new source standards must reflect the variations of technology and operating practices and procedures within an industry. It accomplished that objective, however, not by providing variances from the general standards for individual facilities, but by authorizing the Administrator, for the purpose of establishing "Federal standards of performance for new sources," to "distinguish among classes, types, and sizes within categories of new sources" (Section 306(b)(2)). As Congressman Wright, one of the conferees on the bill, noted, "[f]or some categories of sources the number of subclasses might be extensive," because of "different processes and products." Leg. Hist. 259. This Court has upheld the use of different regulatory standards for different subcategories in an industry that have different technological and operating characteristics. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784–787.

In setting performance standards for new sources, the Administrator created subcategories reflecting differences among plants relating to such factors as the amount of raw material processed, the types of operations or processes employed, the plant's proximity to population or processing centers, and the rate of production. For example, he established different standards for the manufacture of chlorine and sodium or potassium hydroxide by the mercury cell process (40 C.F.R. 415.62, subsection (a)) and by the diaphragm cell process (subsection (b)). He made similar distinctions in standards for numerous other industries and subcategories. See, *e.g.*, 40 C.F.R. 415.165, 417.25, 418.35, 420.15, 424.25, 426.135, 429.15. Small and large plants often are subject to different standards. *E.g.*, 40 C.F.R. 428.55, 428.65, 428.75 (different standards for small, medium-sized, and large rubber plants). See also 40 C.F.R. 419.15(b)(1) (different limitations for each of seven different size categories of petroleum refineries); 40 C.F.R. 425.15. He also made distinctions based on process complexity, 40 C.F.R. 419.15(b)(2), 419.42(b)(3), and the characteristics of process water discharges, 40 C.F.R. 423.15, 40 C.F.R. 419.15(c).

The Act itself makes special provision for flexibility in the application of new source standards for the discharge of heat. The Administrator, or a State with an approved permit program, may adjust the thermal limitations applicable to any new source if its owner or operator establishes that the standard is unnecessary for "the projection [*sic*] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife * * *." Section 316(a), 33 U.S.C. (Supp. V) 1326(a).

In addition to these statutory provisions and regulations, further flexibility in the application of new source performance standards is provided through the Administrator's authority to change the standards to meet changing circumstances and developing technology. Section 306(b)(1)(B), 33 U.S.C. (Supp. V) 1316(b)(1)(B). He can thus modify the requirements for a particular industrial subcategory with particular problems, to reflect changes in the operating practices and technology of that particular segment.

D. The Statutory Provisions Upon Which duPont, *et al.*, Rely Do Not Establish That the Administrator May Grant Variances From the New Source Performance Standards

DuPont, *et al.*, attempt to answer the foregoing arguments by asserting that other provisions of the Act manifest a congressional intent to permit variances from new source standards. They rely on (1) Sections 306(e), 309 and 505, 33 U.S.C. (Supp. V) 1316(e), 1319 and 1365, which provide for federal and citizen enforcement of new source standards directly against new sources that have not obtained a permit; and (2) Section 402(k), 33 U.S.C. (Supp. V) 1342(k), which provides that, for enforcement purposes, compliance with a permit is deemed compliance with Section 306. From these two propositions they conclude that permits may be issued that "override" and supplant the applicable new source

standards (Pet. Br. 6–9). The conclusion is a *non sequitur*.

The fact that new source standards may be directly enforced against new sources that have not obtained a permit sheds no light on whether variances from those standards must be provided in individual permits. The basic congressional plan was that, before beginning to discharge pollutants, new sources would obtain a permit prescribing the maximum amounts of permissible discharge. There would be situations, however, in which a new source might begin to operate without first obtaining a permit. The enforcement provisions upon which duPont, *et al.*, rely were intended to deal with that situation.

As this Court noted in *Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board*, No. 74–1435, decided June 7, 1976, the purpose of Section 402(k) is to accord finality to permits and provide assurance to industry that obtaining a permit will fulfill most of its obligations under the Act. The Administrator is required periodically to reassess and revise the effluent limitations and new source performance standards. Sections 301(d) and 306(b)(1)(B). The reason for Section 402(k) is to insure that, once a point source has obtained a permit– which is deemed compliance with the Act—the Administrator's substantive changes in effluent limitations will not place the permit holder in violation of the Act. Indeed, in the case of new sources, Section 306(d) provides that a new source

built in accordance with the new performance standards will not be subject to more stringent standards for 10 years, even though the term of permits cannot exceed five years. Section 402(b), 33 U.S.C. (Supp. V) 1342(b).

The companies also argue that because the Environmental Protection Agency may be subject to the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, in the issuance of permits to new sources, its environmental assessment under that Act will provide a "good factual basis for adjusting a new source standard to obtain particular limitations for an individual plant" (Br. 9). But whether it would or not [13] is irrelevant to the question in this case: whether the Federal Water Pollution Control Act requires the Administrator to permit individual variances from the uniform standards for new sources. As we have shown, the reconsideration of those standards in their application to individual plants that the companies urge is precisely what Congress wished to avoid.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it set aside the new source regulations because of their failure to provide any variance provisions and remanded the case to the Administrator to provide "some limited escape mechanism for new

[13] Section 511(c)(2)(B), 33 U.S.C. (Supp. V) 1371(c)(2)(B), in fact bars reliance on NEPA to alter effluent limitations.

sources" (A. 263). In all other respects the judgment should be affirmed (see nn. 2 and 3, *supra*, and the Administrator's brief in No. 75–978).

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1473 and 75-1705

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners (and Cross-Respondents),

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Respondent (and Cross-Petitioner).

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS (AND CROSS-RESPONDENTS)

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On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS (AND CROSS-RESPONDENTS)

This reply brief, like the pertinent opening brief and responsive brief, will focus only on the issue raised by the government's ("EPA's") cross-petition for certiorari in No. 75-1705. That issue pertains to EPA's regulations constituting "new source" standards of performance for the inorganic chemicals industry, promulgated under Section 306 of the Federal Water Pollution Control Act, as amended ("the Act"), 33 U.S.C. § 1316.[1]

I.

EPA WOULD ABROGATE CONGRESS' PURPOSE IN PROVIDING SEPARATELY IN THE ACT FOR PROMULGATION OF NEW SOURCE STANDARDS BY REGULATION AND FOR ISSUANCE OF PERMITS FOR NEW SOURCES

For new sources, as well as for existing sources, Congress provided that affected plants should be subject to a permit

[1] Subsequent citations to the sections of the Act in this reply brief will omit references to the parallel United States Code citations.

system operated under the terms of Section 402. Permits issued under Section 402(a) by EPA, and permits issued under Section 402(b) by States with approved programs, must among other things reflect "applicable requirements . . . [of] sections . . . 306 [etc.]. . . ." (§§ 402(a)(1), 402(b)(1)(A).) Once a permit has issued, under Section 402(k) "[c]ompliance with a permit issued pursuant to this section [402] shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health."

Under EPA's interpretation of Sections 306 and 402, permit authorities must issue permits for new sources under Section 402 which apply by rote the new source standards promulgated under Section 306. (EPA's Br. at 6-7.) As EPA would have it, the new source standards are "ironclad" (*id.* at 13), and new plants are barred from making any showing in the permit proceedings to justify an exception from the generally applicable standards. This interpretation would abrogate Congress' purpose in providing separately in the Act for promulgation of new source standards by regulation and for issuance of permits for new sources.

Congress had good reason to make provisions for application of the permit system to new sources. New sources covered by a standard for one of the "classes" (subcategories) within an industry category will not inevitably take on the precise configuration contemplated by EPA when the standard for the given subcategory was written. The permit procedure provides a means of adjusting the standards for the exceptional case where the permit applicant demonstrates that his circumstances are different. As the Second Circuit observed in another but similar context:

> "Not all of the thousands of plants in operation can be expected to fit into prefabricated molds or templates. *By specifying a permit procedure, Congress implicitly conferred on the permit-grantor the privilege of construing the broader regulations in light of the specific type of plant applying for the permit.*"

(*Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 537 F.2d 642, 647 (2d Cir. 1976) (emphasis added).) [2]

In short, even for new sources, Congress intended that the permit authority do something other than merely identify the new source standard or standards applicable to the

[2] The Second Circuit was addressing the matter of "variance flexibility" for existing plants. See Pet. Reply Br. in No. 75-978, at 30 & n.27. Differences among plants within a subcategory are likely to be more prevalent for existing plants. Such differences will nonetheless arise for new plants as well, albeit with less frequency.

EPA says—

> "To impose such ironclad standards upon [existing plants] would be unfair. It would also contravene the congressional intent to achieve, by 1977 and 1983, effluent limitations that shall require application of 'the best practicable control technology currently available' and 'the best available technology economically achievable,' respectively."
>
> (EPA's Br. at 13.)

However, EPA then says: "No similar problem exists for new sources." (*Id.*) EPA makes this claim on the ground that "[a] new plant can be designed and equipped to utilize from its inception the best available pollution control technology." (*Id.* at 14.)

Taken in the abstract, petitioners agree with EPA's asserted ground: a new plant can be built from scratch to employ the best technology. The difficulty is that this circumstance does not support EPA's claim. A particular new plant's situation can be so different from the plants EPA contemplated in setting the standard, that even where the particular new plant employs the "best" technology it will not achieve the effluent results reflected in the standard. The differences might arise, for example, because of climate, raw material, product produced (where the subcategorization is based other than on products), grade of product (perhaps of high purity), process employed, the necessity to take special measures to control air emissions, or a combination of these various factors.

EPA says any such potential differences among new sources are taken into account by the Agency's having created subcategories. (EPA's Br. at 20.) EPA cites examples of subcategories created for rubber plants, petroleum refineries, and several other industrial categories. (*Id.*) In each instance, however, EPA's creation of subcategories within one basic industrial category reflects one or at most two of the factors set out in the preceding paragraph. The subcategories do not and cannot take into account all possible new-plant variations. Any standards which attempted to be all-encompassing would be much longer and more complex even than the present standards. They also would have to predict accurately and precisely the future changes in and development of nearly all segments of the nation's industry.

plant.[3] The "escape valve," which the court of appeals directed EPA to include in the new source standard, would allow the permit authority to adjust the requirements of the standard to take into account special circumstances at a particular plant. Such a "safety valve" would not, however, confer authority to deviate from the technological criterion of "best available demonstrated control technology" established by Section 306(a)(1).[4] Subject to the statutory technological criterion, the permit system established by Section 402 calls for the exercise of some judgment by the permit authority respecting a plant's individual circumstances.[5]

[3] Because of the way the Act's definitions are written, all new plants are not new sources. A "new source" is

> "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." (§ 306(a)(2).)

As a result of this definition, any and all "new sources" will be subject to an outstanding, applicable new source standard. There will be no new sources for which there are no standards. Thus, there could never be a standards "gap", and accordingly permit proceedings for new sources must have a purpose other than filling such a gap.

[4] For existing plants, the inherently flexible nature of guideline regulations would allow permit authorities to act within specified limits to set permit conditions appropriate for the particular plant involved. See Pet. Reply Br. in No. 75-978 at 30-31. The permit limitations would reflect "best practicable control technology currently available" for the 1977-step, and "best available technology economically achievable" for the 1983-step. (§§301 (b)(1)(A), 301(b)(2)(A).) Also for existing plants, but by way of contrast, Section 301(c) authorizes EPA to set permit limitations for a particular plant which are more permissive than the 1983-step criterion (reflected in the values specified in the range for each parameter in the 1983-step guideline regulations), if a requisite cost-based showing is made. See Pet. Reply Br. in No. 75-978 at 29-30.

[5] The adjustments contemplated under the "safety valve" would enable a new plant to be built. There are two other provisions of the Act which could lead to permit conditions different from, and more stringent than, the applicable new source standard. However, since a permit for a new plant must comply with the Section 306 "best available demonstrated control technology" criterion (§ 306(a)(1)), the more stringent conditions would, as EPA recognizes, amount in effect to a prohibition on construction. *(Continued on next page.)*

Like the Second Circuit, the Fourth Circuit in *du Pont II* recognized this congressional purpose when it directed EPA to "come forward with some limited escape mechanism for new sources." (App. 263.) Similarly, the Eighth Circuit has recognized that permit proceedings have some role in carrying out the statutory scheme for new sources. In *CPC International Inc.* v. *Train*, ——F.2d——, 9 E.R.C. 1301 (8th Cir. 1976) *("CPC II)*, the court held that in EPA's new source standard for corn wet mills the Agency need not provide for the statistically-expected "excursions" from the numerical values in the standard, because in the court's view the Federal- or State-issued discharge permit for a new source could contain provisions allowing for excursions even though the standard itself did not do so. (*Id.*, 9 E.R.C. at 1308.)

EPA says: "No other court of appeals that has considered the new sources standards has adopted this requirement [for a 'safety valve' procedure]." (EPA's Br. at 11 n.8.) This statement may be technically correct, because no court of appeals other than the Fourth Circuit has had the safety-valve issue presented directly to it. But both the Second Circuit in the *NRDC* case and the Eighth Circuit in the *CPC II* case concur in principle with the Fourth Circuit that a limited adjustment capability is essential to the reasonableness of EPA's general standards. These courts all would ascribe some purpose to permit proceedings for new sources, contrary to EPA's arguments.

Section 302 authorizes EPA to set for a particular plant "water quality related effluent limitations", and Section 510 authorizes States to set more stringent limitations. If the "best available demonstrated control technology" (§ 306(a)(1)) is deemed insufficient under either Sections 302 or 510, the plant at a minimum would face the task of developing a new and better technology before the plant is operated. Neither plant owners nor regulatory officials would welcome the risk inherent in relying upon development of technology better than "best available". As Deputy Administrator Quarles of EPA put the matter in a recent speech, these considerations "will in some cases preclude permission for construction of additional industrial facilities." Address by Deputy Administrator John R. Quarles, *To Grow Or Not To Grow—That Is Not The Question*, Fifth Annual International Pollution Engineering Congress, November 10, 1976, at 6.

II.
EXCEPT IN EXTRAORDINARY CASES, STATUTES PROVIDING FOR AGENCY RULES OF GENERAL APPLICABILITY ARE CONSTRUED TO INCLUDE USE OF "SAFETY VALVE" PROCEDURES TO PROVIDE RELIEF WHERE SPECIAL CIRCUMSTANCES ARE SHOWN

EPA argues that "[t]he cases the Fourth Circuit cited (A. 263) do not support its conclusion that variance provisions are mandatory." (EPA's Br. at 18 n.12.) EPA then seeks to explain away *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972); *Portland Cement Ass'n* v. *Ruckelshaus*, 158 U.S. App. D.C. 308, 332, 486 F.2d 375, 398-399 (1973), *cert. denied*, 417 U.S. 921 (1974); and *International Harvester Co.* v. *Ruckelshaus*, 155 U.S. App. D.C. 411, 437, 478 F.2d 615, 641 (1973). EPA argues that the *Allegheny-Ludlum* decision merely approves an agency's discretionary authority to adopt safety valve procedures for general rules (EPA's Br. at 18-19 n.12), and that the *Portland Cement* and *International Harvester* cases depended upon special facts.

EPA's distinctions are of questionable worth. More importantly, however, the government would ignore the fact that the *Allegheny-Ludlum* decision is but the most recent of a line of decisions in this Court and in the courts of appeals which have held that agencies have an obligation to look at the facts of "particular individualized cases" even where a general rule is involved. See *WAIT Radio* v. *Federal Communications Commission*, 135 U.S. App. D.C. 317, 321, 418 F.2d 1153, 1157 (1969). Due process considerations underlie a regulated party's right to present to an agency facts supporting an allegation that the objective of a general rule will not be served by applying the rule to the party's particular circumstances. As the court in *WAIT Radio* put the matter:

> "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." (*Id.*, 418 F.2d at 1157.)

See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 764, 771-772 (1968); *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 39-41 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 n.10, 204-205 (1956); and *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943).[6]

EPA would avoid the thrust of these decisions by arguing that Congress has affirmatively demonstrated an intent to have the new source standards apply by rote to all who fall within the ambit of the standards. (See EPA's Br. at 18.) This argument rests upon a simple and obvious error in reading the legislative history and deserves no credit. This is *not* the extraordinary case where the otherwise applicable "safety valve" doctrine, reflected in the *Allegheny-Ludlum* and *WAIT Radio* line of cases, is overridden by an express congressional determination that these particular general rules should always be applied whatever the circumstances of application might be.

III.
CONGRESS DID NOT PROVIDE THAT NEW SOURCE STANDARDS MUST ALWAYS BE APPLIED NOTWITHSTANDING THE EXISTENCE OF SPECIAL CIRCUMSTANCES

EPA argues that Congress demonstrated that it was unwilling to permit any deviation from the new source stan-

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[6] As early as 1943 in the *National Broadcasting* decision, this Court recognized the necessity to provide a procedure for examining the facts of particular cases notwithstanding the existence of an applicable general rule:

> "The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an independent judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" (*Id.*)

dards when it rejected a provision that would have allowed even a limited exemption for those sources which would have become subject to the new source standards because of modification. (EPA's Br. at 17-18.) This argument by EPA entirely misses the point of the cited congressional action.

Both the Senate- and House-passed bills did contain a provision which would have allowed the Administrator to exempt from the new source standards a source that became subject to the standards as a result of modification and which met a cost-based factual test. See, *e.g.*, H.R. 11896, 92d Cong., 2d Sess., § 306(b)(1)(C) (1972), 1 *Leg. Hist.* at 993. This provision was deleted by the Conference Committee. See S. Rep. No. 92-1236, 92d Cong., 2d Sess., at 128 (1972), 1 *Leg. Hist.* at 311. The reason for the deletion, however, was *not* that Congress decided to allow no exemptions whatsoever to the new source standards. Rather, Congress instead decided that modifications to existing plants should not be treated as new sources for purposes of the applicability of the new source standards:

> *"The Conferees deleted reference to the term 'modification' when applied to new sources.* The inclusion of this requirement in the Senate and the House bill was believed by the Conferees to be superfluous in light of the provisions which require existing sources (which might become subject to new source performance standards as a result of modification) to meet specific levels of effluent reduction by specific dates pursuant to section 301. To subject those sources to interim levels of control, simply because of a 'modification', would be redundant with the requirements of effluent limitations based on best practicable and best available technology. In any event, if an existing source modifies or changes its operation so as to alter the nature or amount of pollutants discharged, these would be a violation of the conditions of an existing permit and subject to review by the permitting agency. Further action by that source could be required. *The Conferees determined that the process established under section 306 for 'modifications' would be burdensome, duplicative and, therefore, it was deleted."*
> (*Id.*, 1 *Leg. Hist.* at 311-312 (emphasis added).)

And since the special cost-based exemption applied only to modifications, it too was deleted from the Act.[7]

The remaining portions of the legislative history cited by EPA restate the statutory requirement that new sources employ the "best available demonstrated control technology." (See EPA's Br. at 15-17.) These excerpts do not bear on EPA's argument that such technology is reflected by the values in the Agency's new source standards in every conceivable case. The legislative history shows no intent by Congress to adopt EPA's proposition.

IV.

THE PROVISIONS OF SECTION 402(k) EXPLICITLY PROVIDE FOR PERMIT CONDITIONS WHICH ARE DIFFERENT FROM EPA'S NEW SOURCE STANDARDS

Section 402(k) provides that, for purposes of the Act's enforcement provisions, compliance with a permit is deemed compliance with Section 306. EPA acknowledges as much. (EPA's Br. at 21.) However, EPA contests petitioners' resulting argument that permits may be issued which are different from and which supplant the new source standards. EPA says the conclusion is a *non sequitur* (EPA's Br. at 22), presumably on the ground that the Agency has found an alternative possible purpose for the provisions in Section 402(k). According to EPA, that purpose is to provide finality for permits, *i.e.*,

> "to insure that, once a point source has obtained a permit—which is deemed compliance with the Act—the Administrator's substantive changes in effluent

[7] Respecting the exemption provision, the Conference Report states simply that: "Section 306(b)(1)(C) of the Senate bill and the House amendment has been eliminated." (*Id.*, 1 *Leg. Hist.* at 311.) This comment should be read in light of the remarks pertaining to "the process established under Section 306 for 'modifications' ", quoted above, because that "process" included the exemption provision.

> limitations [*sic*—new source standards] will not place the permit holder in violation of the Act."
> *(id.)*

However, to accomplish the five-year-finality purpose which EPA suggests,[8] Congress did not have to write Section 402(k) as it did. A less encompassing provision would have sufficed. Indeed a different provision, Section 306(d), serves precisely the purpose EPA suggests, but provides for ten-year finality, double the five years EPA would offer, and for a broader class of plants. Section 306(d) provides that "*any* point source," not just a new source, "the construction of which is commenced" after enactment of the 1972 Amendments and which is built to meet "all applicable standards of performance" shall not be subject to "any more stringent standard of performance" for ten years beginning after completion of construction. (See Pet. Br. at 7 n.6.)

In sum, EPA would assign a purpose to Section 402(k) which is much narrower in scope than the language of the provision. EPA's suggested purpose is also served by another portion of the Act, Section 306(d); however, this provision, like Section 402(k), is broader in scope than EPA's assigned purpose. The effect of EPA's argument would be to attach a strained and artificially narrow construction to Section 402(k), and thereby to eliminate any opportunity for review of an individual new source's circumstances by permit authorities. Then EPA could have the "ironclad standards" it seeks for new sources. (See EPA's Br. at 13.)[9]

[8] Under Section 402(b)(1)(B), permits "are for fixed terms not exceeding five years . . . ."

[9] Petitioners do not argue that the National Environmental Policy Act ("NEPA"), as amended, 42 U.S.C. §§ 4321 *et seq.* provides authority to issue permits for new sources different from new source standards. *But cf.* EPA's Br. at 23 & n.13. Section 402 of the Act provides such authority. The NEPA inquiry which takes place for EPA-issued new source permits (see Pet. Br. at 8-9 & n.9) merely insures that the permit authority will fully explore the basis for any claim for divergence from the new source standards while at the same time assuring observance of the technological criterion of "best available demonstrated control technology." (§ 306(a)(1).)

This Court should reject EPA's arguments, and should instead construe the statute as Congress wrote it. Congress provided for the application of the permit system to new sources, and incorporated Section 402(k) to give weight and effect to the permit process. The permit system is essential to fair operation of the Act. It should not be crippled.

Conclusion

The court of appeals in *du Pont II* correctly ruled that EPA's new source standards must contain a "safety valve" procedure. The Court should affirm this portion of the *du Pont II* decision.

Respectfully submitted,

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Petitioners,

v.

RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE

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Brown v. *EPA,* 521 F.2d 827 (9th Cir. 1975), *cert. granted,* No. 75-909, 44 U.S.L.W. 3681 (June 1, 1976)..... 50

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Leedom v. *Kyne*, 358 U.S. 184 (1958) 18

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CONGRESSIONAL MATERIALS:

Senate Committee on Public Works (Library of Congress), A Legislative History of Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Jan. 1973) (Comm. Print) (2 Vols.) (cited Leg. Hist.) .....*passim*
CONF. REP. No. 92-1236, 92d Cong., 2d Sess. (1972) ..27, 29, 40, 43
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Letter of Administrator Ruckelshaus to John A. Blatnik, Chairman, Committee on Public Works, dated December 13, 1971 21
Remarks of Administrator Ruckelshaus, Annual Meeting of Pollution Control Federation, *reprinted in* 45 J. WATER POLLUT. CONTROL FED. 1 (1973) 10, 11

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BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE

INTEREST OF AMICUS CURIAE

Amicus Curiae American Petroleum Institute (hereinafter "API")[1] is a petitioner in *American Petroleum Institute, et al.* v. *EPA, et al.,* Consol. Nos. 74-1465, 74-1466, 74-1621 (10th Cir., argued March 24, 1976),[2] which challenges the Environmental Protec-

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[1] Petitioners in Nos. 75-978, 75-1473, and 75-1705 and the United States Solicitor General have consented to the filing of this amicus curiae brief by letters submitted to the Clerk of the Court pursuant to Rule 42(2).

[2] The API member companies which are named petitioners in American Petroleum Institute v. EPA, *supra,* include Continental

tion Agency's "effluent limitations guidelines" and standards of performance for existing and new petroleum refineries under the Federal Water Pollution Control Act Amendments of 1972 ("the Act"). API was also an appellant in *American Petroleum Institute* v. *Train,* 526 F.2d 1343 (10th Cir. 1975), which upheld court of appeals' jurisdiction to review EPA's "effluent limitations guidelines" for existing petroleum refineries.

API has maintained before EPA and the Tenth Circuit, as well as before other circuits as amicus curiae,[3] that EPA is required by Section 304(b) of the Act[4] to issue, not rigid, single-number existing plant standards, but rather flexible "guidelines" for tailoring and finalizing individual plant effluent limitations in the Section 402 State/federal permit pro-

Oil Company; Exxon Corporation; Gulf Oil Corporation; Phillips Petroleum Company; Shell Oil Company; Standard Oil Company of California; Standard Oil Company (Ohio); Sun Oil Company of Pennsylvania; Texaco, Inc.; and Union Oil Company of California.

[3] API has previously participated as amicus curiae before the courts of appeals in CPC International, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975) (*"CPC Int'l"*); American Meat Institute v. EPA, 526 F.2d 442 (7th Cir. 1975) (*"AMI"*); E. I. du Pont de Nemours & Co. v. Train, 8 ERC 1718 (4th Cir. 1976) (*"du Pont II"*); Hooker Chemicals & Plastics Corp. v. Train, 8 ERC 1961 (2d Cir. 1976) (*"Hooker"*); American Frozen Food Institute v. Train, 8 ERC 1993 (D.C. Cir. 1976) (*"AFFI"*).

[4] Parallel United States Code citations for the sections of the Act most frequently cited in this brief are:

Section 101—33 U.S.C. § 1251
Section 301—33 U.S.C. § 1311
Section 304—33 U.S.C. § 1314
Section 306—33 U.S.C. § 1316
Section 402—33 U.S.C. § 1342

gram. In view of the substantial impact which the outcome of this case may have on API's pending Tenth Circuit petition for review,[5] API respectfully requests the Court's consideration of the arguments and authorities presented in this amicus curiae brief.

Since API accepts court of appeals' jurisdiction and does not contest the Fourth Circuit's decision in *E. I. du Pont de Nemours & Co.* v. *Train,* 528 F.2d 1136 (4th Cir. 1975), *cert. granted,* No. 75-978, 44 U.S.L.W. 3585 (April 19, 1976) (*"du Pont I"*), this amicus curiae brief has been filed in Nos. 75-1473 and 75-1705 rather than in 75-978. However, insofar as the arguments and authorities presented herein are relevant to No. 75-978, API respectfully requests that they be considered in that docket also.

SUMMARY OF ARGUMENT

This case raises fundamental questions regarding the appropriate role of the States and the need for discretion by State officials to accommodate the enormously varied circumstances of thousands of existing industrial plants required to obtain permits under the Act's State/federal replacement of the previous federal Refuse Act permit program.

In the 1972 Amendments, EPA sponsored and Congress codified the Agency's own program of flexible technology guidelines developed administratively under the Refuse Act permit program. As an alternative to the previous system of water quality permits, the 1972 Amendments intended an "orderly transfer of

[5] Over and above legal issues common with this proceeding, API's pending Tenth Circuit petition challenges EPA's existing refinery "effluent limitations guidelines" and new refinery standards of performance on numerous additional legal, scientific and technical grounds.

permit authority" to the States through flexible "Federal guidance" in the form of detailed information affording State permit authorities carefully circumscribed discretion to tailor effluent limitations to the circumstances of individual plants.

Although EPA followed this pragmatic statutory approach for nearly a year, the Agency elected in late 1973 to usurp all but a nominal role for the States, ostensibly because the States might prove too "lax" in formulating permits taking account of the diverse, local circumstances of individual existing plants. Specifically, the Agency developed so-called "effluent limitations guidelines" for existing plants in inorganic chemicals and dozens of other industries which provided single-number discharge standards to be "mechanically cranked" by the States into individual discharge permits.

As detailed in this amicus curiae brief, EPA's abandonment of flexible "Federal guidance" to the States and subsequent issuance of rigid existing plant standards is fundamentally at odds with the overall statutory plan. For whatever imprecision may exist in other provisions of the Act, the text of Section 304(b) is explicit as to how Congress intended to regulate pollution from existing sources.

Specifically, Congress prescribed in Section 304(b) that EPA "*shall*" promulgate "*guidelines for* effluent limitations" within one year so that this "Federal guidance" could be utilized by the States in finalizing effluent limitations for individual existing plants.[6] In these guidelines, Congress mandated that EPA "*identify* . . . the *degree* of effluent reduction attainable" and

[6] All emphasis added throughout this amicus curiae brief unless otherwise indicated.

"*specify factors to be taken into account* in determining the control measures . . . to be applicable *to point sources.*" Nowhere did Congress authorize or even mention single-number standards in Section 304(b), a fact that is critically significant in light of the express provision elsewhere for national, independently enforceable new source "standards of performance" (Section 306), "toxic effluent standards" (Section 307(a)), and "pretreatment standards" (Section 307(b)).

Over and above the specific text of Section 304(b), which is confirmed by a coordinated reading of Sections 306, 307 and other provisions of the Act, the legislative history also strongly supports Congress' intent that EPA issue flexible guidelines rather than rigid standards for existing plants. Thus, both the Senate and Conference Committee Reports reaffirm Congress' contemplation that the Section 304(b) "guidelines for effluent limitations" identify a "*range*" of feasible discharge levels and "*specify factors*" for use by the States in tailoring individual plant permits to prevailing local circumstances.

Even more significant, EPA's existing plant standards, which must be "mechanically cranked" into individual permits, contradict the "primary pollution control responsibilities" reserved by Congress for the States. Indeed, Congress deliberately rejected the "inflexible[,] Washington dictated approach" adopted by EPA because such federal "usurpation" would "destroy the initiative of the States and local governments" and prove "wasteful and non-productive" in the long run.

Nor can EPA's rigid national standards be justified as a misguided attempt to achieve "uniformity" among existing plants. On the contrary, Congress recognized

that genuine "uniformity" could be achieved only by treating diverse sources differently and by avoiding procrustean standards which ignore widely varying individual plant circumstances. Indeed, it was precisely to guarantee such "uniformity" that Congress rejected rigid existing plant standards and opted instead for an EPA veto over individual plant permits under Section 402(d) of the Act.

Nothing in EPA's so-called "variance" provision changes this result. Hence, because EPA purports to have considered even plant-specific factors in its "effluent limitations guidelines," EPA's "variance" clause, which applies only in the case of "fundamentally different factors," has proved to be a practical nullity.

In fact, precisely because EPA's so-called "variance" clause provides far less flexibility than Congress intended, it is imperative that this Court promptly disapprove EPA's single-number discharge standards and invalidate the Agency's so-called "variance" provision. For otherwise, the many hundreds of plants still without permits are unlikely to resolve pending administrative proceedings equitably, and ultimately will have no choice but to seek judicial review of their individual permits in the federal courts of appeals under Secton 509(b) of the Act.

STATEMENT OF THE CASE

A history of the specific development of EPA's "effluent limitations guidelines" for the inorganic chemicals industry has been detailed by petitioners. *See* Petitioners' Brief in No. 75-978 at 13-22 (hereinafter "Pet. Br."). For purposes of this amicus curiae brief, all that is necessary is a chronological description, tracing the evolution of EPA's control efforts from the flexible technology "guidelines" and predominant

State role originally favored by EPA and codified by Congress in the 1972 Amendments to the rigid, single-number existing plant standards ultimately promulgated by EPA for mechanical application by State permit-issuing authorities in individual plant permits.

1. EPA's Experience with Technology Guidelines Under the Refuse Act Permit Program

Shortly after its formation in 1970, EPA was given responsibility for making water quality determinations in discharge permits issued pursuant to Section 13 of the Refuse Act of 1899, 33 U.S.C. § 407. *See* 36 Fed. Reg. 6564, 6566 (1971). Although EPA recognized that individual plant discharge limits would depend ultimately on the receiving stream water quality, EPA decided that its responsibilities under the Refuse Act permit program could best be carried out by establishing sets of technology "guidelines" for each major industry. The purpose of these technology "guidelines" was to provide a reference for the development of individual plant permits in the permit-issuing process.

From the outset, EPA recognized that such "guidelines" could serve only as a general benchmark for individual plant permits because of the enormous diversity and complexity within the broad industry categories to be regulated. Indeed, the disparate features of individual plants, including varying manufacturing processes, age, size, complexity, wastewater characteristics, location, climate, and other factors, precluded EPA from reducing industry discharge limits to a "simple formula computation."

EPA's view that no set of single-number discharge standards could substitute for the "careful exercise of

professional judgment" in developing individual plant permits was concisely summarized in Congressional testimony by John R. Quarles, Jr., then EPA Assistant Administrator for Enforcement and General Counsel:

> "The complexities of such determinations, together with the *infinite variations from case to case,* indicate that the establishment of effluent specifications *cannot be reduced to simple formula computation.*
>
> * * *
>
> "The effluent computation formulas which will be furnished to [permit authorities], when available, may be used to *supplement existing techniques for establishment of effluent specifications.* They will provide a quick method to determine whether proposed specifications are within a normal *range* but will not reduce the need for *careful exercise of professional judgment.*"[7]

More than anything else, it was this Refuse Act permit program experience which prompted EPA to support flexible "Federal guidance" rather than rigid, across-the-board existing plant standards when Congress in 1972 turned to consideration of amendments to the Federal Water Pollution Control Act.

2. EPA's Support and Acceptance of "Federal Guidance" During and After Passage of the 1972 Amendments

As detailed during their consideration by Congress, the 1972 Amendments were designed to effect two principal modifications in the Federal Water Pollution Control Act.

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[7] Memorandum, John R. Quarles, Jr., Assistant Administrator for Enforcement and General Counsel, July 1, 1971, *Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92d Cong., 1st Sess. 1834-35 (1971).

First, the new legislation proposed "a major change in the enforcement mechanism of the federal water pollution control program from water quality standards to effluent limits."[8] This change was to be accomplished by adopting and codifying the approach of flexible technology "guidelines" established administratively by EPA under the Refuse Act permit program.

Second, Congress intended to accomplish an "orderly transfer of permit authority from the Environmental Protection Agency to the States" as "rapidly as they develop approved programs." 1 Leg. Hist. 363, 2 Leg. Hist. 1305. This "transfer of permit authority" "to the States" reflected Congress' recognition that "[i]t is impossible for the Federal Government to succeed in this program without the close and active cooperation of the States." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 125 (1972), 1 Leg. Hist. 812. Indeed, without "meaningful local and State participation," rather than "a Federal dictatorship," Congress envisioned that "the program will founder on the rocks of the generally inflexible[,] Washington dictated approach." 1 Leg. Hist. 355.

Consequently, EPA consistently supported legislation calling for the issuance of "Federal guidance" to State permit authorities for setting individual plant effluent limitations in the permit-issuing process. As explained by then EPA Administrator Ruckelshaus to the Senate Air and Water Pollution Subcommittee,

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[8] *See* S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971), 2 Leg. Hist. 1425; EPA v. California *ex. rel.* State Water Resources Control Bd., 44 U.S.L.W. 4781, 4782 (June 7, 1976).

Citations to "Leg. Hist." refer to the two-volume Committee Print entitled "A Legislative History of the Water Pollution Control Act Amendments of 1972," 93d Cong., 1st Sess. (1973).

> "[w]e believe that such *Federal guidance* is especially important in the area of effluent limitations. This concept is new in the law. It would be difficult and needlessly *duplicative* for each State to gather all the scientific, *industrial,* and *technological information* upon which effluent limitations must be based. *Federal leadership* must be provided here *so that the States, in setting effluent limitations,* have a clear idea of the task."[9]

Accordingly, at EPA's urging, Congress adopted amendments to the Act which expressly require EPA to promulgate "regulations providing *guidelines for* effluent limitations." As interpreted by Administrator Ruckelshaus after the passage of the Act, these guidelines incorporated the flexible "Federal guidance" favored by EPA:

> "*[E]very plant involves individual factors which differentiate it from others* and directly affect what would be the best practicable control technology *for that plant. EPA's guidelines* will provide the most comprehensive effort ever made on a national basis to *provide information* with respect to industrial waste control technology. However, to do the job on *specific plants* will take the full-time efforts of hundreds of *Federal and State* pollution control people, working as a team . . . . The EPA guidelines . . . *will not be the final answer to pollution control questions.*"[10]

Implicit in this flexible "guidelines" approach was Congress' recognition that EPA could not possibly establish equitable, single-number discharge standards

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[9] *Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92d Cong., 1st Sess. 19 (1971).

[10] *Remarks of Administrator Ruckelshaus,* Annual Meeting of Pollution Control Federation (October 11, 1972), *reprinted in* 45 J. WATER POLLUT. CONTROL FED. 1, 2 (1973).

for mechanical application to all *existing* plants in a given industry. EPA's then Assistant Administrator for Enforcement Quarles, the official with principal responsibility for administering the permit program, explained this point as follows:

> "The key to most of the puzzles concerning the policies we will follow in this area is that specific determinations as to application of best practicable control technology currently available can only be made on a plant-by-plant basis. *There is no way that anyone can sit in Washington and prepare a document that will specify effluent limitations that should be attained at numerous plants across the country.*"[11]

Following passage of the Act, EPA immediately began to apply administratively the flexible "Federal guidance" approach mandated by Congress. Early in 1973, EPA promulgated interim "Guidance" documents which set forth a range of feasible discharge levels and specified variable factors for each industry to assist in establishing individual plant permit conditions under the new State/federal permit program.[12]

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[11] Address of John R. Quarles, Jr., to an EPA-Manufacturing Chemists Association Symposium, September 13, 1972. Deputy Administrator Quarles' remarks echo Administrator Ruckelshaus' comparable admission "that there is no way anyone in Washington can properly prepare a document that specifies the effluent limitations for all the tens of thousands of plants across the country." 45 J. WATER POLLUT. CONTROL FED. 1, 2 (1973).

[12] The "Petroleum Refining Guidance" document expressly acknowledged that circumstances "will vary widely among individual refineries," and, accordingly, identified a range of feasible discharge levels as well as a host of specific "factors" (*e.g.,* "availability of land," "types of crude oils," "refinery age," "climate and geographic location") to guide the exercise of professional judgment by the permit-issuing authorities. *See also* Pet. Br. 14-15.

Simultaneously, EPA set about the task of updating and improving its guidance to permit authorities in light of the requirements of the 1972 Amendments. In this connection, EPA published Requests for Proposal for all major industrial categories, soliciting bids from engineering contractors for studies which would "identify the *range* of control and treatment technology within each industrial category and subcategory." *See* Pet. Br. 14. Like EPA's "Guidance" documents, these Requests for Proposal reflected EPA's recognition of the hazards of a "generally inflexible[,] Washington-dictated approach" as well as the impossibility of preparing "a document that will *specify* the effluent limitations that should be attained at numerous plants across the country." *See* pp. 7-11, *supra*.

Specifically, EPA acknowledged that the Act contemplates "a *range* of technology," and that "*effluent limitations* consistent with the application of such technology *will* also *vary*." Accordingly, EPA directed potential contractors to "[l]ist the *factors* which should be taken into account in determining Level I and Level II control technology for *particular plants* and consequently in determining *permissible effluent levels for such plants*." *See also* Pet. Br. 14.

If EPA had continued to follow the flexible "Federal guidance" approach adopted by Congress and largely reflected in EPA's own Guidance documents and Requests for Proposal, many of the difficulties giving rise to the avalanche of more than two hundred lawsuits challenging EPA's implementation of the 1972 Amendments might never have occurred. Notwithstanding this early, faithful implementation of Congress' intent, however, EPA decided late in 1973 to

abandon the statutory "guidelines" approach, and instead to promulgate rigid, single-number discharge standards to be "cranked mechanically" by the States into individual plant permits.

3. EPA's Expedient Abandonment of the Statutory Guidelines and Promulgation of Rigid Discharge Standards Which Revoke the States' Primary Role Under the Permit Program

The full story behind EPA's decision to discard Congress' flexible technology guidelines and to opt instead for rigid, single-number discharge standards may never be known. *See* Pet. Br. 15-22. However, this much is clear—EPA acted not on the basis of what was realistic for widely disparate existing facilities or sound from a technical standpoint, but on the basis of short-run expediency in the face of litigation by environmental groups designed to repeal "meaningful local and state participation" and to resurrect the "Federal dictatorship" approach rejected by Congress. *See* pp. 8-13, *supra*.

In particular, the Natural Resources Defense Council ("NRDC") threatened to file suit in April 1973 if EPA did not publish guidelines for industrial categories by October 1973 and issue permits for all point sources by December 31, 1974. Although these deadlines were completely unrealistic for EPA to do an adequate professional job of promulgating meaningful guidelines and issuing permits, NRDC nonetheless filed suit in August 1973 against EPA in the United States District Court for the District of Columbia.

Three months later, without apparent perception of the far-reaching consequences for EPA and the many affected industries, the district court entered an order compelling EPA to publish industry-by-industry regu-

lations at approximately one-week intervals extending from January 15, 1974 through November 29, 1974.[13] This timetable proved unachievable and, even now, EPA has not issued regulations for all the industries specified by the district court. *See* Pet. Br. 17 n.25.

Under these circumstances, the district court's order became an excuse for EPA to disregard the Act and repeal the States' prescribed "primary" role in the permit program. Hence, confronted with unworkable deadlines for the promulgation of guidelines and issuance of permits, EPA short-circuited the statutory guidelines by issuance of binding, single-number discharge standards, ostensibly because EPA believed the States would be too "lax" in formulating permits taking account of the diverse, local circumstances of individual existing plants. R. 6500-04; Pet. Br. 19.

The first hint of EPA's switch to rigid, existing plant standards was signalled in August 1973 when EPA coined the expression "effluent limitations guidelines," appearing nowhere in the Act, to describe the regulations which it planned to issue for existing sources. 38 Fed. Reg. 21202 (1973). Publication of proposed regulations for many industries later in 1973 revealed the purpose of EPA's expression "effluent limitations guidelines" used to describe its existing plant regulations—specifically, EPA intended to ignore the guidance step altogether and issue rigid *existing* plant standards identical in form and format to the *new* plant standards expressly called for in Section 306 of the Act.

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[13] Natural Resources Defense Council v. Train, 6 ERC 1033 (D.D.C. 1973), *rev'd in part and remanded*, 510 F.2d 692 (D.C. Cir. 1975).

As an afterthought, most likely to shore up its position in upcoming litigation challenging its so-called "effluent limitations guidelines," EPA included in its final regulations a previously unproposed "variance procedure," ostensibly designed to permit departure from EPA's 1977 "effluent limitations guidelines" for "certain plants" within each industrial category. However, because EPA purported to consider even plant-specific factors such as size, age, and manufacturing processes in developing its regulations, the "variance procedure," which applies only to factors "fundamentally different from the factors considered in the establishment of the guidelines," has little, if any, practical significance.

Consequently, EPA's "effluent limitations guidelines" violated the Agency's own basic maxim that "[t]here is *no way* anyone can sit in Washington" and set "effluent limitations that should be attained at numerous plants across the country." For stripped of the so-called "variance procedure" which has never actually provided individual plant flexibility, EPA's "effluent limitations guidelines" amount to rigid across-the-board standards which deprive State permit-issuing authorities of the plant-by-plant discretion intended by Congress in the 1972 Amendments.

This fundamental rigidity of EPA's "effluent limitations guidelines" has been consistently criticized by the scientific and technical community. For example, the Effluent Standards and Water Quality Information Advisory Committee ("ES&WQIAC"), which Congress chartered under Section 515 of the Act to "provide, assess and evaluate scientific and technical information" and to oversee EPA development of Section 304(b) guidelines, has repeatedly warned EPA against

procrustean standards that ignore the widely disparate circumstances of individual existing plants.

On this basis, ES&WQIAC condemned EPA's "effluent limitations guidelines" as *"arbitrarily established inflexible standards"* which give minimal consideration to *"great differences in individual facilities* among generic industries with regard to raw waste load, size of plant, age and type of process equipment now operating in a given plant, and climatic and geographic location factors."[14] Indeed, the statutory scientific committee two years ago foresaw that "[m]ost effluent limitations guidelines . . . *can be met only under certain controlled, perfect conditions* . . . ."[15]

Rather than straitjacket industry with "arbitrarily established inflexible standards," ES&WQIAC forcefully recommended that EPA return to the statutory "guidelines" approach. Thus, according to the statutory committee, "[r]ather than set *one number* as an effluent limitation to be met by all plants within an industry," technically sound guidelines promulgated by EPA "should establish a *range* of limits . . . "[16]

In short, as officially reviewed by ES&WQIAC, EPA's "effluent limitations guidelines" are "unscientific" since they disregard "great differences in individual facilities" which could have been accounted for had EPA promulgated "guidelines" establishing a "range of limits." As perceived by this authoritative

[14] BNA Environment Reporter, Current Developments, p. 855 (September 28, 1973).

[15] BNA Environment Reporter, Current Developments, p. 1481 (March 8, 1974).

[16] *Id.*

ES&WQIAC evaluation, the short-term administrative expediency which prompted EPA's decision to forego the issuance of legally valid guidelines will inevitably prove enormously wasteful and counterproductive to efficient and lasting pollution control progress.

ARGUMENT

I. SECTION 304(b) REQUIRES EPA TO ISSUE, *NOT* RIGID EXISTING PLANT *STANDARDS*, BUT RATHER FLEXIBLE *"GUIDELINES"* FOR TAILORING EFFLUENT LIMITATIONS TO THE CIRCUMSTANCES OF INDIVIDUAL PLANTS IN THE PERMIT-ISSUING PROCESS.

Seven courts of appeals have now rendered nine separate opinions dealing with EPA's construction and implementation of Sections 301(b) and 304(b) of the Act.[17] Three separate and distinct issues emerge from these several opinions: (i) which court or courts have jurisdiction to review EPA's existing plant regulations; (ii) whether EPA is authorized to issue effluent limitations by regulation under Section 301(b) of the Act; and (iii) what is the proper role and required format of the "guidelines for effluent limitations" mandated by Section 304(b) of the Act.

Although these distinct questions have unfortunately tended to merge in the various court opinions, only the last issue, namely the purpose and content of Section 304(b) "guidelines for effluent limitations," critically affects the degree of discretion afforded State and EPA permit-issuance authorities to provide flexibly for disparate existing plant circumstances in individual discharge permits.

[17] American Petroleum Institute v. Train, 526 F.2d 1343 (10th Cir. 1975) (*"API"*); American Iron & Steel Institute v. EPA, 526 F.2d 1027 (3d Cir. 1975) (*"AISI"*); Natural Resources Defense Council v. EPA, 8 ERC 1988 (2d Cir. 1976) (*"NRDC"*). *See also* cases cited at p. 2 n.2, *supra; du Pont I*, p.3, *supra.*

For example, the issue of court of appeals' jurisdiction to review EPA's regulations may be resolved independently of both EPA's purported authority to issue effluent limitations by regulation under Section 301 and the required content of "guidelines for effluent limitations" under Section 304(b). As the Tenth Circuit explained in *API, supra,* the "[e]xistence of jurisdiction must not be confused with the exercise of that jurisdiction," and, regardless of the "validity or invalidity" of the Administrator's action, jurisdiction here "is incident to a federal statute granting the right to an interested person within the circuit to file a petition in the court of appeals to review agency action." 526 F.2d at 1345. *Accord, du Pont I, supra,* 528 F.2d at 1141.[18]

[18] Amicus accepts the existence of court of appeals' jurisdiction under Section 509(b)(1)(E) on the theory that, whatever else they are, EPA's "effluent limitations guidelines" constitute an "action of the Administrator" in "approving or promulgating" effluent limitations implemented in individual plant permits. However, any ruling by this Court that review jurisdiction lies *exclusively* in the courts of appeals might nullify several actions pending in the district courts and impose hardships on industries forced to reinstitute review actions in the courts of appeals on the eve of the July 1, 1977 statutory deadline. *See* Grain Processing Corp. v. Train, 407 F. Supp. 96 (S.D. Iowa 1976), *appeal pending,* No. 76-1233 (8th Cir.); National Renderers Ass'n v. Train, No. 75-0-482 (D. Neb.); American Ass'n of Meat Processors v. Train, No. 75-0-394 (D. Neb.); National Independent Meat Packers Ass'n v. EPA, No. 75-0-369 (D. Neb.).

Accordingly, this Court might hold such suits to have been properly instituted in the district courts if they allege actions "in excess of [EPA's] delegated powers and contrary to a specific prohibition in the Act." Leedom v. Kyne, 358 U.S. 184, 189 (1958). *See* H.R. REP. No. 92-211, 92d Cong., 2d Sess. 136 (1972), 1 Leg. Hist. 823 ("[T]he inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law."). Similarly, the Court might validate jurisdiction over petitions initially instituted in the courts of appeals as pendent to actions to review EPA's new source standards of performance. *See* Pet. Br. 94-96.

Alternatively, the Court might restrict to *prospective* application only any ruling that review jurisdiction lies exclusively in either the courts of appeals or district courts. *See, e.g.,* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); Allen v. State Bd. of Elections, 393 U.S. 544, 571-72 (1969) ("prospective effect" only given to jurisdictional ruling where "questions involve complex issues of first impression—issues subject to rational disagreement"); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422-23 (1964) (applying ruling prospectively after finding petitioners' submission of case to wrong court not an "unreasonable" misinterpretation of earlier Court decisions).

Likewise, the role of Section 304(b) "guidelines for effluent limitations" in the permit program is not resolved even if EPA were authorized to issue effluent limitations by regulation. For as held by the Third Circuit in *AISI, supra,* even if Section 301(b) empowers EPA to issue effluent limitations as a "ceiling" to the guidelines "range," this still would not dispense with the independent Section 304(b) requirement that EPA also issue "guidelines for effluent limitations" which provide "guidance to the permit-issuing authorities as to what factors to consider or how to set the particular discharge level within a feasible range . . . ." 526 F.2d at 1045-46.

Accordingly, this amicus curiae brief presents a coordinated reading of Sections 301, 304 and other provisions of the Act, which focuses on the central question of how Congress intended to accommodate the widely varying circumstances of individual existing plants under the Section 402 State/federal permit program. As we shall show, Congress contemplated that EPA would provide admittedly needed flexibility through the issuance of "guidelines for effluent limitations" which "identify" a "range" of feasible dis-

charge levels and "specify factors" for use by State and EPA permit-issuance authorities in tailoring permit conditions to the particular circumstances of individual existing plants.

A. In Contrast to Section 301(b), Which Does Not Authorize the Issuance of Any Regulations, Section 304(b) Expressly Requires EPA Promulgation of "Regulations, Providing Guidelines for Effluent Limitations" Which "Identify" the "Degree of Effluent Reduction Attainable" and "Specify Factors to Be Taken into Account" in the Permit-Issuing Process.

From the beginning, EPA has justified its issuance of so-called "effluent limitations guidelines" on a purported authority to issue nationwide effluent limitations under Section 301(b) of the Act. Although the courts have strained to find such authority in Section 301(b), they have invariably been forced to rely upon the Administrator's Section 501(a) power "to prescribe such regulations as are necessary to carry out his functions under this Act." *See, e.g., AISI, supra,* 526 F.2d at 1039; *AMI, supra,* 526 F.2d at 449; *du Pont II, supra,* 8 ERC at 1721.

But reliance on Section 501(a) begs rather than answers the threshold question of whether EPA issuance of single-number existing plant standards is even consistent with, much less "necessary" for the Administrator "to carry out his functions under this Act." The scope of EPA's role in this area depends upon Section 304(b), which spells out, rather than leaves to implication, the Administrator's "functions" in controlling existing source pollution. As we shall show, this provision contemplates, not across-the-board standards, but "guidance" to the States by regulations identifying a "range" of feasible discharge levels and

"specifying factors" to be taken into account by permit-issuance authorities in formulating individual plant effluent limitations.

The place to begin any statutory interpretation is with the text of the Act. The simple fact is that "[n]othing is said in § 301 about regulations." *du Pont II, supra,* 8 ERC at 1721. Rather, Section 301(b) merely "sets up specified goals for July 1, 1977 and July 1, 1983" to be "achieved" through "limitations" which "require application of the control technology established by the Administrator under § 304." *API, supra,* 526 F.2d at 1345.

Irrespective of any supplemental regulatory authority under Section 501(a), the EPA "Administrator not only has the power, but the *explicit obligation* to promulgate 'guidelines' under Section 304." *AISI, supra,* 526 F.2d at 1042. Even a cursory reading of the requirements of Section 304(b) shows that Congress intended EPA to issue regulations providing for more detailed guidance, and affording far greater discretion for State and EPA permit-issuance authorities, than provided by the single-number "effluent limitations guidelines" actually promulgated by EPA.

As captioned in the official version of the 1972 Amendments, the whole purpose of Section 304 is to provide "*information and guidelines*" so that State and federal officials can carry out their responsibilities under the Act. 1 Leg. Hist. 37.[19] Consistent with this

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[19] Throughout Congressional consideration of the 1972 Amendments, EPA consistently viewed and referred to Section 304 as restricted to "information requirements." *See, e.g.,* Letter of Administrator Ruckelshaus to John A. Blatnik, Chairman, Committee on Public Works, dated December 13, 1971, 1 Leg. Hist. 845.

objective, Section 304(b) specifies "guidelines for effluent limitations" with the obvious intent that such "guidelines" were not themselves "limitations" but were for the purpose of setting effluent limitations. And plainly such guidelines are for the permit-issuing authorities, not EPA, since it is "clearly an illogical interpretation" for EPA to argue that "the Administrator is required to promulgate guidelines for broad categories or classes which are to guide *himself* in setting precise limitations for specific point sources." *AISI, supra,* 526 F.2d at 1042 (emphasis in original).

This is amply demonstrated by the text of Sections 304(b)(1)(A) and (B) of the Act which provides that "guidelines for effluent limitations" shall:

> "*identify*, in terms of *amounts* of constituents and chemical, physical, and biological *characteristics* of pollutants, the *degree* of effluent reduction attainable . . . for classes and categories of *point sources* . . . ."

Notwithstanding criticisms of the Act as a "poorly drafted and astonishingly imprecise statute," *du Pont II, supra,* 8 ERC at 1721, Congress was careful in this provision to employ terms emphasizing flexibility so that EPA would set a *range* of feasible discharge levels. Therefore, the statute requires EPA *not* to *set* a *specific* discharge *number,* but to *identify* or categorize the *degree* or *scope* of effluent reduction attainable. Congress underscored that a *range* of discharge *levels* would be identified by use of the plural term "*amounts,*" and by calling for descriptive information regarding the "chemical, physical and biological characteristics of pollutants." *See Grain Processing, supra,* 407 F. Supp. at 103-04.

Any doubt that these terms indicate Congress' desire that EPA promulgate a "range" of feasible discharge levels rather than inflexible single-number limits is removed by the remaining text of Section 304(b). Thus, Congress in the second sentence of Sections 304(b)(1)(B) and (b)(2)(B) required EPA to consider a host of general factors on an industry-wide basis when identifying the range of discharge levels feasible for each industry category and subcategory.

The balance of the text in those sections proves that Congress intended much more than mere industry-wide consideration of factors in developing "guidelines for effluent limitations." For Congress recognized that the most important factors (including plant age, processes, process engineering problems and the like) would differ from industry to industry, and also from plant to plant within each industrial category.

To account for this variation, the first sentence of Section 304(b)(1)(B) provides that "guidelines for effluent limitations" "*shall*":

> "*specify factors to be taken into account* in determining the control measures . . . to be applicable *to point sources* . . . within such categories or classes."

A virtually identical provision is contained in Section 304(b)(2)(B) relating to "guidelines for effluent limitations" to achieve the Act's 1983 goal.

As held by the Third Circuit in *AISI,* this provision in Sections 304(b)(1)(B) and (b)(2)(B) "clearly contemplates that the guidelines promulgated by the Administrator . . . are to provide *guidance* to those authorities (presumably, the permit grantors) which determine the *precise degree* of effluent control required

of any *individual* point source." 526 F.2d at 1042. *Accord, Grain Processing, supra,* 407 F. Supp. at 104.

Hence, Congress expressly mandated that EPA "*shall*" "*specify* factors" which would be most important for each industry, and purposely employed the future tense, "*to be taken into account*," as a means of emphasizing that such factors were for *future* use by permit authorities in establishing precise effluent limitations for discrete "*point sources*" within the industrial category. In the Third Circuit's words, this provision can only be construed as meaning that "consideration of the enumerated factors was to be made by the permit grantors on a plant-by-plant basis." *AISI, supra,* 526 F.2d at 1043.

In short, the express statutory requirement that EPA "*specify factors*" in the "guidelines" reaffirms both Congress' direction that EPA identify a "*range*" of levels (for otherwise it would make little sense to "specify factors"), and Congress' prohibition of rigid standards for existing plants (which would likewise make specification of "factors" redundant). By the coordinate requirements that EPA identify a "range" of feasible levels and "specify factors" to be considered by permit authorities in selecting individual plant effluent limitations from the "range," Congress thus provided a workable middle ground between *de novo* development of individual plant effluent limitations on one hand, and unbending, procrustean national standards on the other.

B. Over and Above the Specific Text of Section 304(b), the Entire Statutory Scheme Deliberately Distinguishes Between *New* Sources, Which Are Subject to "Across-the-Board" National *Standards*, and *Existing* Sources, Which Are to Be Controlled by *Guidelines* for Use in the State/Federal Permit Program.

Apart from the specific text of Section 304(b) detailed above, an overall reading of Title III of the Act reaffirms Congress' intention that EPA regulate existing plants, not by across-the-board national standards, but much more flexibly through the issuance of guidelines for finalizing effluent limitations in the permit-issuing process.

First, Congress' omission of *any* authority to issue nationwide standards for existing sources plainly "was not *oversight,* for Congress provided unambiguously for the promulgation of national standards in other sections of the Act." *CPC Int'l, supra,* 515 F.2d at 1038. Specifically, as the Eighth Circuit explained in *CPC Int'l,* "[n]ationally promulgated standards were expressly mandated for new sources in § 306(b)(1)(B), for toxic discharges in § 307(a)(2), and for pretreatment standards in § 307(b) and (c)." *Id.* (footnote omitted).

Moreover, the statutory text of each of these provisions demonstrates that Congress consistently used the term "*standards*" when it intended EPA to promulgate fixed, *across-the-board restrictions by regulation.* Thus, Congress did four things in providing for *national* standards in these areas:

> "(1) it used the term "*standards,*" a word which takes on a special meaning because of its use under the Act; (2) it expressly provided that the *standards* were to be *published by regulation;* (3) it put *deadlines* on the process, *requiring that the Ad-*

ministrator publish the standards within a fixed period of time; and (4) it provided that *standards* were to be *enforceable independently of the permit system. See* § 306(e); § 307(d)." *Id.*

Since *none* of these elements exists in the regulatory scheme established by Congress for *existing* sources, EPA's promulgation of rigid, across-the-board standards under the guise of so-called "effluent limitations guidelines" is *prima facie* unlawful and in violation of the overall Congressional plan.

The fundamental illegality of EPA's use of the *same* regulatory format for both *new* and *existing* plants is confirmed by a closer review of the separate and contrasting statutory provisions for *new* and *existing* sources.[20] For *new* sources, Section 306(b) explicitly mandates the issuance of fixed "standards of performance" by "regulations" designed to be "national" in scope. By contrast, Section 301 *never once* mentions *standards,* much less the issuance of standards by regulations subject to a statutory deadline and made en-

[20] EPA has yet to reconcile the express provision for nationwide standards by regulation in Sections 306, 307(a), (b) and (c) with the conspicuous omission of *any* authority for the issuance of regulations under Section 301. The Seventh Circuit in the *AMI* case would paper over this gaping hole in EPA's position by suggesting that "Section 316(b)'s reference to '[a]ny *standard* established pursuant to section 301' tends to undermine" the Eighth Circuit's analysis in *CPC Int'l. See AMI, supra,* 526 F.2d at 450 n.17.

But use of the expression "standard" in Section 316 is easily reconciled by reference to Section 301(b)(1)(A)(ii), which provides for the achievement by 1977 of "applicable pretreatment requirements and any other requirement under section 307." *See also* Section 301(b)(2)(A)(ii). Established pursuant to this provision of Section 301, of course, are the pretreatment *standards* of Sections 307(b) and (c), thereby explaining the mention of *"standard"* in Section 316(b).

forceable independently of the permit program. *Compare* Section 306(e).[21]

Congress' use of the term "standards" to designate across-the-board regulations applicable nationwide is confirmed by the legislative history which shows that Section 306 "standards shall be applicable to *any new source* regardless of where it is constructed," and that "the Administrator must set the *standard* at a *particular* volume of effluent or a *particular* percentage of effluent reduction."[22] This explicit requirement of binding, nationwide *standards* for *new* sources contrasts with the Section 301 references to "effluent limitation," defined by the Act to include "schedules of compliance" which, by their nature, can be established *only* in the context of an individual discharge permit. *See* Section 502(11).[23]

[21] Significantly, Congress used the term *"standards"* no fewer than *nineteen* times in Section 306, relating to *new* plants, but *never once* mentioned *"standards"* in either Section 301 or 304, applicable to *existing* plants.

[22] H.R. REP. No. 92-911, 92d Cong., 2d Sess. 110 (1972), 1 Leg. Hist. 797; S. REP. No. 92-414, 92d Cong., 1st Sess. 59 (1971), 2 Leg. Hist. 1477. Comparable legislative history demonstrates that other statutory provisions calling for the issuance of standards similarly contemplate the issuance of across-the-board nationwide restrictions by regulation. *See, e.g.,* Section 307(a) ("toxic effluent standards"); H.R. REP. No. 92-911, 92d Cong., 2d Sess. 159 (1972), 1 Leg. Hist. 846 (referring to "*Federal* effluent standards and prohibitions for toxic substances"); Section 307(b) ("pretreatment standards"); CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 129 (1972), 1 Leg. Hist. 321 (referring to "*national* pre-treatment standards").

[23] The expression "standards" in Section 306 is derived from the analogous provision for *new* emission source "standards of performance" under Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6. *See* EPA v. California *ex rel.* State Water Resources Control Bd., *supra* n.8, 44 U.S.L.W. at 4783-84 (noting the "strong

Congress' rationale for requiring nationwide, single-number "*standards*" for *new* but not for *existing* sources is set forth in the legislative history. Thus, as detailed by the Eighth Circuit, the "*separate* regulatory schemes for *new* and for *existing* point sources" established in the Act reflect the "contrasting policies applicable to plants to be constructed in the future and those already in place." *CPC Int'l, supra,* 515 F.2d at 1038 n.13.

It was this basic difference between "plants to be constructed in the future and those already in place" which prompted Administrator Train (then Chairman of the Council on Environmental Quality) to recommend "*across-the-board*" standards for *new* as opposed to *existing* plants:

> "*Across-the-board requirements* can be justified for *new* plants, since they have *many options* in terms of processes, inputs and the like, which is *not the case for existing facilities.*" *Hearings on H.R. 11896 Before the House Public Works Comm.,* 92d Cong., 2d Sess. 201 (1972), 2 Leg. Hist. 1115.[24]

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structural and terminological similarities between the Clean Air Act and the 1972 Water Pollution Control Act Amendments").

The national, across-the-board "*standards*" contemplated by this Clean Air Act *new* source provision likewise stand in marked contrast to the flexible *existing* source controls of Section 110, recently discussed and explicated by this Court in Train v. NRDC, 421 U.S. 60 (1975). *See also* Hancock v. Train, 44 U.S.L.W. 4767, 4774 (June 7, 1976) (accepting Congress' distinction between the regulation of new and existing sources under the Clean Air Act but holding that this distinction alone failed to provide "clear and unambiguous congressional authorization" of State permits for federal facilities under Section 110 of the Act.)

[24] Senator Muskie made much the same point in an Exhibit containing his personal views on "significant provisions of the bill,"

Illustrative of the many "options" available to *new* plants are production process changes which cannot be accomplished by plants already in place:

> "The Conference [Section 306] substitute requires establishment of a regulatory mechanism for *new sources* which anticipates not only that level of effluent reduction which can be achieved by the application of technology (including where practicable elimination of the discharge of pollutants), but also the achievement of *levels of pollution control* which are *available through the use of improved production processes,* taking into consideration the cost of achieving such effluent reduction." CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 128 (1972), 1 Leg. Hist. 311.[25]

Over and above "improved production processes" which are generally available only to *new* sources, the House Committee stressed the much greater and highly variable costs of pollution reduction for plants already in place when compared with plants newly built

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presented during Senate debate on the House-Senate Conference Report:

> "[P]ollution control *alternatives* are *available* to a *new* source which are *not available* to *existing* sources.
>
> "It may be that in most instances, the *technology* for elimination of discharge of pollutants from *new* sources can be *achieved* on a considerably *more reasonable* basis *than* for *existing* sources." 1 Leg. Hist. 172.

[25] The Conference substitute follows the Senate bill and House amendment except for the deletion of Section 306(b)(1)(C), a provision which would have permitted "appropriate adjustments" from an applicable standard of performance "upon application from any owner or operator of any source." 1 Leg. Hist. 311, 2 Leg. Hist. 1626-27. The elimination of this provision again underscores that Congress intended standards of performance to apply "across-the-board" to all new sources. *See* Pet. Br. in Nos. 75-1473, 75-1705.

from scratch. Thus, the Committee's Report stresses that "across-the-board *new* source *standards* are strongly supported by:

> ". . . the significantly lower expense of attaining a given level of effluent control in a *new facility* as compared to the *future cost of retrofitting* a facility to meet stringent water pollution control measures." H.R. REP. No. 92-911, 92d Cong., 2d Sess. 110 (1972), 1 Leg. Hist. 797.

This explicit Congressional acknowledgment of the disproportionate costs and potential economic dislocation of "*retrofitting*" *existing* plants demonstrates why Congress expressly prescribed "*standards*" for *new* but not for *existing* sources. For when the "many options" available to *new* plants not yet designed and built are compared to the high and variable costs of "retrofitting" *existing* plants already in place, the rational legislative choice was to *phase in* new technology for *existing* plants by stages in 1977 and 1983 through Section 304(b) "guidelines" implemented flexibly through individual discharge permits, taking into account the widely varying age, engineering design, processes, feedstocks, climate and other factors affecting the pollution control capabilities of each specific plant.

In sum, it was no "oversight" or coincidence that Congress chose to regulate *new* and *existing* sources under different and sharply contrasting statutory provisions. On the contrary, precisely because of its understanding of the inherent differences between *new* and *existing* plants, Congress wisely chose to phase new technology into *existing* plants, *not* by across-the-board *standards,* but through the "goals" set forth in Section 301(b), "to be achieved" by flexible Section

304(b) "*guidelines*" for finalizing effluent limitations in the permit-issuing process.

II. THE LEGISLATIVE HISTORY REAFFIRMS CONGRESS' INTENTION THAT EPA ISSUE FLEXIBLE "GUIDELINES FOR EFFLUENT LIMITATIONS," IDENTIFYING A "RANGE" OF FEASIBLE DISCHARGE LEVELS AND "SPECIFYING FACTORS" FOR USE IN THE STATE/FEDERAL PERMIT PROGRAM.

As demonstrated above, the Act makes sense as a coordinated whole only if EPA is required to regulate existing sources through the issuance of "guidance" to State and EPA officials for use in the permit program. Otherwise, there would be no explanation for: (i) the "goals" established in Section 301; (ii) the "guidelines" called for in Section 304; (iii) the far different scheme of new source "standards of performance" established by Section 306; (iv) the express provision for the imposition of nationwide toxic and pretreatment standards by regulation in Sections 307(a), (b) and (c); or (v) even the Section 402 State/federal permit scheme which would be an exercise in futility if EPA were authorized to issue across-the-board, enforceable existing plant standards by regulation.

Congress' intent that EPA issue flexible guidelines for use in the permit program is reaffirmed and amplified by the legislative history. Hence, as we will show: (i) the Senate and Conference Committee Reports confirm Congress' enactment of technology guidelines identifying a "range" and "specifying factors" for use in the permit-issuing process; (ii) any other interpretation would effectively repeal Congress' "transfer of permit authority" so that the States could "do the job" without "Federal dictatorship"; and (iii) rigid, national standards defeat Congress' purpose of achiev-

ing genuine "uniformity" of treatment for disparate existing plants through flexible guidelines and EPA veto power over individual permits.

A. The Senate and Conference Committee Reports Confirm Congress' Enactment of Technology Guidelines Identifying a "Range" and "Specifying Factors" for Use in the Permit-Issuing Process.

As previously detailed, the impetus for the "guidelines for effluent limitations" eventually included in Section 304 came principally from EPA, based on the Agency's *own* prior experience with informal technology "guidelines" under the Refuse Act permit program. *See* pp. 6-13, *supra*. This EPA experience proved the impossibility of reducing "effluent specifications" to a "simple formula computation" and demonstrated that "[t]here is *no way* that anyone can sit in Washington and prepare a document that will specify effluent limitations that should be attained at numerous plants across the country." *Id.* at 8, 11, *supra*.

With this Refuse Act permit experience in mind, EPA supported legislation calling for "Federal guidance" in the form of "scientific, industrial and technical information" so that "the States, in setting effluent limitations," would have "a clear idea of the task." *Id.* at 9-10, *supra*. Consequently, it was always intended by EPA itself that effluent limitations would be set, not through regulations promulgated by EPA, but "*by means of the permits* issued under Title IV" of the Act.[26]

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[26] Administrator Ruckelshaus stressed this very point in a letter to Chairman Blatnik of the House Public Works Committee:

> "Effluent limitations required by Section 301 *would be established* and applied to all point sources . . . *by means of the permits* issued under Title IV.
>
> "We favor the approach whereby effluent limitations would be applied to dischargers through a *permit mechanism*." 1 Leg. Hist. 844. *See also CPC Int'l, supra*, 515 F.2d at 1039-40.

Against this background, Congress acknowledged the impossibility of translating available technology into single-number discharge standards for all existing plants, and accordingly accepted the need for flexible guidelines so that "specific effluent limitations for each industrial source" could be established "through the permit program." As the Senate Committee put it:

> "Unfortunately, . . . little has been done to identify for industry the exact meaning, on a *plant-by-plant basis*, of the equivalent of secondary treatment. *Through the permit program established under section 402*, with the help of those States which have effective programs, the Administrator and the States can and should . . . be able to apply *specific effluent limitations* for *each industrial source*." S. REP. No. 92-414, 92d Cong., 1st Sess. 44 (1971), 2 Leg. Hist. 1462.

Amplifying this point, the Senate Report further explained that the "guidelines for effluent limitations" provided in Section 304(b) would allow specific permit conditions to be established "for each industrial source," based on EPA's establishment of a "range" of feasible levels for the entire industry:

> "The Administrator should establish the *range* of best practicable *levels* based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." S. REP. No. 92-414, 92d Cong., 1st Sess. 50 (1971), 2 Leg. Hist. 1468.[27]

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[27] Similarly, regarding the 1983 goal set forth in Section 301, the same Report stressed the requirement that EPA establish a *"range"* of feasible discharge levels:

> "In making the determination of 'best available' the Com-

This requirement that EPA establish a "range" of feasible levels was retained by the Conference Committee in the final version of Section 304(b):

> "The Administrator should establish the *range* of 'best practicable' levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." 1 Leg. Hist. 169.[28]

Similarly, the second requirement of Section 304(b), *i.e.*, that EPA "specify factors," was intended by Congress to provide sufficient information so that the permit-issuing authority could tailor permits to the circumstances of individual plants through selection of the appropriate discharge level from the guidelines "range." As the Senate Report explained this second requirement of Section 304(b):

> "In applying effluent limitations to any *individual* plant, the factors cited above *should be applied to that specific plant.*" S. REP. No. 92-414, 92d Cong., 1st Sess. 50 (1971), 2 Leg. Hist. 1468.

Likewise, Representative Clausen, a Manager of the Conference Report for the House, pointed to the same

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mittee expects the Administrator to apply the same principles involved in making the determination of best practicable as outlined above except that rather than the *range of levels* established in reference to the average of the best performers in an industrial category the *range* should at a minimum be referenced to the best performer in any industrial category." S. REP. No. 92-414, 92d Cong., 1st Sess. 50 (1971), 2 Leg. Hist 1468.

[28] In Senate debate over the Conference Report, Senator Muskie confirmed the necessity for a *range* of discharge levels:

> "Also, rather than establishing the range of levels in reference to the average of the best performers in an industrial category, the *range* [for 1983] should, at a minimum, be established with reference to the best performer in any industrial category." 1 Leg. Hist. 170.

requirement, explaining that "*all* those factors set forth in sections 304(b)(1)(B) . . . and such other factors as the Administrator deems appropriate *must* be considered in setting effluent limitations" in the permit-issuing process. 1 Leg. Hist. 378. Applying these factors, the specific effluent limitations for plants in the same industry would be similar "if the applicable factors . . . were the same in each plant." *Id.*

Taken together, this legislative history confirms the statutory text requiring EPA to issue "guidelines for effluent limitations" identifying a "range" of discharge levels and "specifying factors" to be used by State permit officials in the permit-issuing process. Indeed, as detailed below, any contrary interpretation affording State officials less discretion with regard to individual plant permit conditions would effectively repeal Congress' "transfer of permit authority" so that the States could "do the job" without "Federal dictatorship." *See* pp. 35-38, *infra.*

B. EPA's Rigid, Single-Number Existing Plant Standards Nullify the States' "Primary" Pollution Control "Responsibilities" and Vitiate the State/Federal Permit Program.

As previously demonstrated, Congress' first objective in the 1972 Amendments was to effect "a major change in the enforcement mechanism of the Federal water pollution control program . . . to effluent limits" by codification of the flexible technology "guidelines" approach established administratively by EPA under the Refuse Act permit program. *See* pp. 8-13, *supra.* Closely coordinated was Congress' concomitant aim of effecting an orderly transfer to the States of the permit authority previously exercised by EPA under the 1899 Refuse Act. *Id.*

In keeping with this latter aim, Section 101(b) of the Act expressed "the policy of the Congress to recognize, preserve, and protect the *primary responsibilities* and rights *of States* to prevent, reduce, and eliminate pollution." Consistent with their "primary" water pollution control "responsibilities," Congress "expected that the States will play a *major role* in the administration" of the permit program, thereby taking advantage of the considerable accumulated professional expertise of State personnel and their intimate appreciation of individual plant circumstances. S. REP. No. 92-414, 92d Cong., 1st Sess. 71 (1971), 2 Leg. Hist. 1489.

Accordingly, Section 402(a)(5) requires EPA to "authorize a State . . . to issue permits for discharges . . . within [its] jurisdiction" as soon as the State has "the capability of administering a permit program." By this provision, Congress intended an "*orderly transfer of permit authority* from the Environmental Protection Agency *to the States*" as "rapidly as they develop approved programs." 1 Leg. Hist. 363, 2 Leg. Hist. 1305.

The purpose of this "orderly transfer of permit authority" was for the States "*to do the job*" by taking "primary responsibility" for utilizing the Section 304(b) guidelines to set effluent limitations in individual discharge permits. 1 Leg. Hist. 234, 356. This purpose was succinctly summarized by Representative Blatnik, Chairman of the Public Works Committee, responsible for the House bill:

> "Unless we have *meaningful local and State participation* and *not a Federal dictatorship,* the program will founder on the rocks of the generally *inflexible*[,] Washington dictated approach.
>
> * * *
>
> H.R. 11896 provides for States and local participation, let us give them the chance *to do the job.* This bill will provide the resources and *direction* they have not had in the past." 1 Leg. Hist. 355-56.[29]

Plainly, the States' "primary responsibility" to "do the job" under the permit program is vitiated by rigid discharge standards to be "cranked mechanically" into existing source permits. Indeed, the House Committee warned against just such federal "usurpation":

> "It is *impossible* for the Federal Government *to succeed* in this program *without* the close and *active* cooperation of *the States.* A *system of permits which* requires duplicative effort or *destroys* the *initiative of the States* and local governments is wasteful and non-productive." H.R. REP. No. 92-911, 92d Cong., 2d Sess. 125 (1972), 1 Leg. Hist. 812.[30]

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[29] Representative Wright, a Conference Committee member and co-sponsor of the House bill, also stressed Congress' conviction that "State and local interest, initiative, and personnel [would] provide a *much more effective* program *than* that which would result from control in the *regional offices of the Environmental Protection Agency.*" 1 Leg. Hist. 262. *See* Sections 303(e)(2) and (3) (requiring, as a prerequisite to approval of a State permit program, State "continuing planning process," among other things, to permit development of "effluent limitations and schedules of compliance").

[30] Significantly, this Court in Train v. NRDC, 421 U.S. 60 (1975), invalidated a similar curtailment of State discretion under the Clean Air Act, which, like the Water Act, recognizes the States' "*primary responsibilities*" for controlling pollution. In *Train,* this Court stressed Congress' mandate of *flexible* State discretion to revise emission limitations:

> "We also believe that Congress, consistent with its declaration that '[e]ach State shall have the *primary responsibility* for

Accordingly, EPA's issuance of single-number discharge standards for existing petroleum refineries is not only contrary to the flexible "Federal guidance" approach consistently favored by EPA, but also fundamentally at odds with the orderly transfer of permit authority envisioned by Congress. For by reducing State permit authorities to scriveners rubberstamping discharge numbers set by edict of EPA Washington headquarters, EPA's rigid standards destroy State "initiative" and trivialize the State/federal permit program established by the Act.

C. Rigid National Standards Defeat Congress' Expressed Purpose of Achieving Genuine "Uniformity" of Treatment for Disparate Existing Plants Through Flexible "Guidelines" and EPA Veto Power over Individual Permits.

Despite EPA's consistent support for technology "guidelines" during and after passage of the Act, and Congress' concomitant aim of transferring permit authority from EPA to the States, isolated fragments in the legislative history have been cited to rationalize EPA's disregard of its explicit obligation to issue guidelines in compliance with the requirements of Section 304(b).[31] Most frequently mentioned is the follow-

assuring air quality' within its boundaries, § 107(a), *left to the States considerable latitude* in determining specifically how the standards would be met. This *discretion* includes the *continuing authority to revise choices* about the mix of emission limitations." 421 U.S. at 86-87.

In light of the Court's *Train* decision, subsequently reaffirmed in Union Electric v. EPA, 44 U.S.L.W. 5060 (June 25, 1976), amicus curiae questions the Seventh Circuit's assumption in *AMI* that single-number discharge standards are "in accord with § 101(b) of the Act" and the policy "of federalism." 526 F.2d at 452.

[31] For example, both the Third and Seventh Circuits cite a reference by Senator Bentsen to "the regulations which we an-

ing statement by Senator Muskie during consideration of the Conference Committee Report:

> "[T]he conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve *nationally uniform effluent limitations* based on 'best practicable' technology no later than July 1, 1977." 1 Leg. Hist. 162; *AMI, supra,* 526 F.2d at 451; *AFFI, supra,* 8 ERC at 1997.[32]

Certainly no one can quarrel with the general concept of "uniformity" of effluent limitations implicit in Senator Muskie's remarks.

ticipate the Administrator shall issue pursuant to section 301 and section 304 . . . ." 2 Leg. Hist. 1283; *AISI, supra,* 526 F.2d at 1040; *AMI,* supra, 526 F.2d at 451. But Senator Bentsen's comment does little more than paraphrase Sections 301(b)(1)(A) and 301(b)(2)(A), respectively, which refer to technology defined "by the Administrator pursuant to Section 304(b)(2)." In short, because of the explicit reference to Section 304(b) in Section 301, the Section 304(b) "guidelines for effluent limitations" are regulations issued, in Senator Bentsen's words, "pursuant to section 301 and section 304."

[32] The Seventh Circuit cites another obscure comment by Senator Muskie that "the factors described in Section 304(b)" may "not be considered at the time of the application of an effluent limitation to an individual point source . . . ." 1 Leg. Hist. 172; *AMI, supra,* 526 F.2d at 451.

However, Senator Muskie's comment overstates and is contradicted by the Conference Committee Report which, by its terms, deals *only* with *individual* plant consideration of "the *economic impact*" of EPA's guidelines. 1 Leg. Hist. 304; *see also* 1 Leg. Hist. 254-55. The Conference Report's discussion reflects the Committee's change from the House version, which required plant-by-plant consideration of *all* factors, to the final version of Section 304(b)(1)(B), which *retains plant-by-plant consideration of other factors* but mandates an industry-wide appraisal of the "*total cost* of application of technology in relation to the effluent reduction *benefits* to be achieved." *Compare* 1 Leg. Hist. 37-40 *with* 1 Leg. Hist. 978-87 (House version of Section 304).

The fundamental issue, however, is whether Congress intended this "uniformity" to be achieved: (i) by flexible guidelines for setting effluent limitations under the Section 402 State/federal permit program or (ii) by the imposition of regulations in the form of nationwide existing plant discharge standards. In fact, the statutory text and legislative history demonstrate that Congress chose the guidelines and permit program, *not* nationwide existing plant standards, as the means of achieving "nationally uniform effluent limitations."

Significantly, the Conference Report notes that the Section 304(b) guidelines are intended "to assure that *similar* point sources with *similar* characteristics . . . will meet *similar* effluent limitations," and that "effluent limitations applicable to individual point sources within a given category or class" are to be, *not identical,* but "as *uniform as possible.*"[33]

Moreover, Section 402(d)(2) of the Act provides that:

> "No permit shall issue . . . if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as *being outside the guidelines* and requirements of this Act."

As indicated by the Eighth Circuit, "[i]t is hard to imagine a clearer indication that the permit-issuing authority is to follow the guidelines promulgated under § 304(b), and is not to refer to independent regula-

[33] CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 126 (1972), 1 Leg. Hist. 309. *See also AISI, supra,* 526 F.2d at 1044 ("uniformity was to be achieved by effluent standards within a given category which were *similar, rather than identical or unitary*") (footnote omitted).

tions promulgated under § 301." *CPC Int'l, supra,* 515 F.2d at 1038-39 (footnote omitted).[34]

The legislative history of this provision provides strong confirmation for guidelines as the means of achieving uniformity of effluent limitations established under the permit program. For as the Eighth Circuit explained:

> "The most instructive portions of the legislative history are those concerning the debate over whether the EPA Administrator should have the authority to veto state-issued permits. The debate is important not only because of what was said, but also because *the creation of the veto power would make no sense if the EPA was already empowered to promulgate regulations under § 301.*" *CPC Int'l, supra,* 515 F.2d at 1040-41.

The original Senate bill spelled out EPA's authority over the permit program in Section 402(d)(2) which provided that "[n]o permit shall issue until the Administrator is satisfied that the conditions to be imposed by the State meet the requirements of this Act." 2 Leg. Hist. 1690.

The House bill provided no EPA veto power over individual permits but rather authorized EPA to with-

[34] The Third Circuit agreed that Section 402 permits must comply "with any guidelines promulgated by the Administrator," but went on to suggest that the term "requirements" in Section 402(d)(2) may refer to "Section 301 limitations." *AISI, supra,* 526 F.2d at 1040. Even if "requirements" were to encompass "Section 301 limitations," the question would remain "*how* these limitations are to be established or *who* is expected to establish them." *Id.* at 1039 (emphasis in original). The legislative history detailed above confirms that such effluent limitations are to be established, not by regulation, but in the Section 402 permit program by State and EPA permit-issuing authorities.

draw permit-issuance authority if "a State fails to carry out its obligations and misuses the permit program." H.R. REP. No. 92-911, 92d Cong., 2d Sess. 127 (1972), 1 Leg. Hist. 814; *CPC Int'l, supra,* 515 F.2d at 1041-42.

This House action was sharply criticized by many officials who believed that "*uniformity*" among existing plants could be achieved only by "Federal review of permit applications." 1 Leg. Hist. 472-76, 707. As Governor Anderson of Minnesota put it:

> "*EPA's veto power* should further apply to help overcome political and other pressures sometimes exerted by local industry on State agencies.
>
> * * *
>
> "The *uniformity* which I cited at the outset of these remarks as the major necessity for an effective pollution control program cannot, therefore, be achieved without permitting this type of *Federal check on permits* which simply do not accomplish the job of pollution control." 1 Leg. Hist. 452-53.

More important, opponents of the House bill also argued that EPA veto power was essential precisely because "the act did *not* provide for nationally promulgated effluent *standards* for *existing* plants." *CPC Int'l, supra,* 515 F.2d at 1041. Against this background, the House nonetheless voted down a floor amendment offered by Representative Reuss designed to "give the Administrator permit-by-permit review and veto authority over all permits . . . ." 1 Leg. Hist. 580; *see also id.* at 577, 582.

Only in the Conference Committee did Congress finally amend Section 402(d) to provide the EPA

"veto power" deemed essential by Governor Anderson, Congressman Reuss and others to prevent industry "pressures" on State permit authorities which might otherwise occur because of the absence of "nationally promulgated effluent standards." CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 140 (1972); 1 Leg. Hist. 323, 362, 452-53; *CPC Int'l, supra,* 515 F.2d at 1041.

Congress' grant of EPA review and veto power over individual permits directly refutes any notion of "nationally promulgated effluent standards for existing plants." *CPC Int'l, supra,* 515 F.2d at 1041. In this respect, Congress' reference to "guidelines" in the final version of Section 402(d)(2) "is critical, for that language was not used in any prior draft of the bill . . . ." *Id.* Thus, by making EPA veto power depend upon compliance with Section 304(b) guidelines, Congress underscored its intention that *guidelines,* not regulations imposing nationwide effluent limitations, were to be "the *means of achieving uniformity.*" *Id.* at 1042.[35]

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[35] This interpretation conforms with Senator Muskie's own explanation of the Conference Committee's version of Section 402(d)(2). 1 Leg. Hist. 176; *CPC Int'l, supra,* 515 F.2d at 1042. To the extent that any of Senator Muskie's other remarks may be construed as going beyond the Conference Report, they are entitled to no weight. Indeed, Senator Jackson characterized the "Exhibit" submitted by Senator Muskie during debate on the Conference Committee Report as:

> "*A back-door attempt at legislation* through . . . speeches on the floor of the Senate . . . . Fortunately, as . . . court decisions have indicated, the courts will not abide . . . *speeches reinterpreting clear legislative language.*" 1 Leg. Hist. 204.

See Commissioner v. Bilder, 369 U.S. 499, 502 (1962) (statutes must be interpreted "in light of the congressional purpose explicitly revealed in the House and Senate Committee Reports on the bill"); NLRB v. Lion Oil Co., 352 U.S. 282, 292 (1957) ("[T]he report of the Senate Committee" is "the most authori-

In short, as confirmed by this legislative history, Congress correctly believed that "some discretion," "carefully circumscribed" by expertly drafted guidelines, was essential to "preserve uniformity" of treatment for diverse existing plants in many industries. *AISI, supra,* 526 F.2d at 1044; *Grain Processing, supra,* 407 F. Supp. at 105.[36] It was precisely for this reason that Congress eschewed procrustean, single-number existing plant standards in favor of flexible guidelines which guarantee fair and equitable discharge limits for disparate existing plants, while simultaneously guarding against abuse in light of EPA's authority to veto individual discharge permits.[37]

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tative legislative gloss."); *Grain Processing, supra,* 407 F. Supp. at 103.

[36] *See also du Pont II, supra,* 8 ERC at 1722 (recognizing Congress' desire that EPA preserve uniformity by exercising "the *flexibility needed* to adjust for disparate plants in *dissimilar* circumstances"); *AISI, supra,* 526 F.2d at 1044 ("[U]niformity was to be achieved by effluent standards within a given category which were *similar, rather than identical or unitary.*").

[37] Notwithstanding the recent *AFFI* decision, this interpretation plainly would *not* "emasculate the act" by promoting competition for industry among States "by establishing minimal standards in their individual permit programs." 8 ERC at 2006. For as the Eighth Circuit correctly held in *CPC Int'l, supra, "an existing plant cannot change its forum* without becoming a new plant, in which case it would be subject to the uniform national standards for new plants promulgated under § 306." 515 F.2d at 1041 n.16. *Accord,* 1 Leg. Hist. 579-80, 379.

III. EPA'S BELATED, EXPEDIENT SWITCH TO SINGLE-NUMBER EXISTING PLANT STANDARDS CANNOT OVERCOME THE STATUTORY TEXT, LEGISLATIVE HISTORY AND EPA'S OWN ORIGINAL INTERPRETATION REQUIRING THE ISSUANCE OF FLEXIBLE GUIDELINES FOR FINALIZING EFFLUENT LIMITATIONS IN THE PERMIT-ISSUING PROCESS.

As previously demonstrated, both the text of the Act and its legislative history reveal Congress' intention that EPA issue "guidelines for effluent limitations" identifying a range of feasible discharge levels and specifying factors for finalizing individual plant permit conditions in the permit-issuing process.

EPA itself accepted this Congressional directive until late 1973 when, faced with a completely unworkable district court decision, the Agency jettisoned its previous guidelines approach in favor of single-number discharge standards which short-circuit the permit program and obliterate the discretion of State permit officials. Since that time, EPA has rarely, if ever, departed from its single-number standards and, instead, has searched unsuccessfully for a legal theory which adequately justifies its expedient about-face from the statutory guidelines.

Under these circumstances, this Court (i) should pay deference to EPA's original authoritative interpretation accepting Congress' flexible guidelines; and (ii) disapprove EPA's "effluent limitations guidelines," including the Agency's so-called "variance clause" which provides far less flexibility and discretion to permit-issuing authorities than intended by Congress. Indeed, only a decision by this Court directing EPA to implement its existing regulations as flexible guidelines will prevent a new wave of Section 509(b)(1) appeals to the courts of appeals by individual

plants suffering under EPA's current regime of single-number existing plant standards.

A. This Court Should Pay Deference to EPA's Original Authoritative Interpretation Accepting Flexible Guidelines for Finalizing Effluent Limitations in the Permit-Issuing Process.

Notwithstanding the statutory text and legislative history detailed above, some courts have nonetheless gone along with EPA's "effluent limitations guidelines" in the hope that EPA's so-called "variance clause" will somehow operate to infuse flexibility into the Agency's existing plant standards. *du Pont II, supra,* 8 ERC 1718 (4th Cir. 1976); *NRDC, supra,* 8 ERC 1988 (2d Cir. 1976); *AFFI, supra,* 8 ERC 1993 (D.C. Cir. 1976); *AMI, supra,* 526 F.2d 442 (7th Cir. 1975). Although the courts differ slightly in how EPA is to implement its regulations, their embrace of EPA's extra-statutory "effluent limitations guidelines" stems largely from deference to EPA's purported interpretation of the Act. *AISI, supra,* 526 F.2d at 1041; *AMI, supra,* 526 F.2d at 449-50, 452; *du Pont II, supra,* 8 ERC at 1721; *AFFI, supra,* 8 ERC at 2007-08.

The Seventh Circuit expressed this "hands off" approach to EPA's latest expedient interpretation as follows:

> "Our inquiry then is not whether the agency's interpretation of § 301 is the only permissible one, but rather whether it is sufficiently reasonable to preclude us from substituting our judgment for that of the agency." *AMI, supra,* 526 F.2d at 449-50 (footnote omitted).

But in light of the statutory text and legislative history previously detailed, nothing in the Act or this

Court's judicial decisions justifies obsequious deference to EPA's eleventh-hour switch to rigid existing plant standards which undercut the State/federal permit program.

On the contrary, it is EPA's *original* interpretation recommending and endorsing Congress' flexible guidelines approach which is legally significant. For this Court has stressed time and again that courts should pay "great deference," *not* to a *subsequent* agency rewrite of the statutory requirements, but to a "*contemporaneous construction* of a statute by the men charged with the responsibility of setting its machinery in motion." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). *Accord, United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396-97 (1956); *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 315 (1933).

Here, EPA's "contemporaneous construction" at the time of passage was indisputably that "*specific* determinations" could "only be made on a plant-by-plant basis,"[38] and that EPA's "guidelines" would "provide information" so that "Federal and State pollution control people" could "do the job" for specific plants.[39] Only in response to unworkable deadlines ordered in *NRDC* v. *Train,* 6 ERC 1033 (D.D.C. 1973), *rev'd in part and remanded,* 510 F.2d 692 (D.C. Cir. 1975), did EPA expediently short-circuit the statutory require-

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[38] *See* p. 11 n.11, and accompanying text, *supra.*

[39] *See* p. 10 n.10, and accompanying text, *supra; see also* pp. 35-38, *supra.* Nothing better attests to the significance of EPA's shift from flexible guidelines to rigid, existing plant standards than the multitude of lawsuits in virtually every industry attacking the inflexibility of EPA's so-called "effluent limitations guidelines."

ments by short-sighted issuance of rigid existing plant standards. *See* pp. 13-14, *supra.*

Under comparable circumstances, this Court in *Train, supra,* 421 U.S. 60 (1975), actually deferred to EPA's *original* interpretation of the Clean Air Act rather than EPA's *subsequent* construction adopted in response to adverse court decisions.[40] Thus, in *Train,* EPA *originally* "concluded that § 110 (a)(3) [of the Clean Air Act] permits a State to grant individual variances from generally applicable emission standards, both *before* and *after* the attainment date, so long as the variance does not cause the plan to fail to comply" with the national ambient standards. *Id.* at 70. In response to judicial decisions adverse to this interpretation, EPA *subsequently* amended its regulations *before* review by this Court to allow variances only prior to the attainment date. *Id.* at 74.

In accepting EPA's *original* rather than *subsequent* interpretation, this Court adopted the result previously reached by the Ninth Circuit in *Natural Resources Defense Council* v. *EPA,* 507 F.2d 905 (9th Cir. 1974). *See* 421 U.S. at 72. There, the Ninth Circuit expressly declined to accord deference to EPA's *subsequent* interpretation for reasons which apply equally well in this case:

> "Under usual circumstances, we would accord 'great deference' to the interpretation of the EPA, the administrative agency responsible for enforcing the statute. *E.g.,* Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). But we feel less bound by this principle when the EPA interpretation is, as here, merely an accession to a previous judicial decision. *Indeed, the construction we adopt is more in tune with the original EPA interpretation* that has *since been abandoned* after the First Circuit's decision in Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875 (1st Cir. 1973)." 507 F.2d at 916 (footnote omitted).

[40] Accordingly, the *AMI* court's reliance on *Train* is inapposite. For the Seventh Circuit ignored the fact that the Supreme Court paid deference to EPA's *original,* not *subsequent* interpretation, and that here, as in *Train,* EPA changed its original interpretation in response to adverse judicial rulings. 526 F.2d at 450 n.16.

Similarly, this Court in *United States* v. *Leslie Salt Co.,* 350 U.S. 383 (1956), rejected the Treasury Department's "*ad hoc* contention as to how the statute should be construed," which had been belatedly adopted in response to a recent court decision, and instead followed the Department's "prior longstanding and consistent administrative interpretation." *Id.* at 396, 395.

The rationale for declining to accord deference to EPA's *subsequent* interpretation is even more compelling where, as here, the Agency's change of position derives primarily from *administrative expediency.*

For example, in *Maryland* v. *EPA,* 530 F.2d 215, 224 (4th Cir. 1975), *cert. granted,* No. 75-960, 44 U.S. L.W. 3682 (June 1, 1976), EPA urged an interpretation of the Clean Air Act which "directed Maryland and her legislature to legislate under pain of civil and criminal penalties" vehicle inspection, maintenance, retrofit and other programs for inclusion in Maryland's State implementation plan. Characterizing EPA's interpretation as an act of "*administrative expediency,*" the Fourth Circuit rejected EPA's position, notwithstanding the usual deference to the Agency:

> "We acknowledge that the construction of a statute by the agency administering it is to be accorded great weight. See, e.g., *Social Security Board v. Nierotko*, 327 U.S. 358, 368 . . . (1946). *But if the acts of the administering agency are not in accordance with law, its actions must be set aside.* 5 USC § 706." 530 F.2d at 227.[41]

In short, the *administrative expediency* which long *after* passage of the Act led EPA to switch to rigid existing plant standards cannot repeal the statutory text and legislative history previously detailed in this amicus curiae brief. Rather, by paying deference, as it did in *Train, supra,* to EPA's original, contemporaneous construction, this Court should require EPA to revert to the statutory guidelines by allowing State permit authorities to exercise discretion regarding individual discharge conditions in the permit process.

B. EPA's Otherwise Unlawful Existing Plant Standards Cannot Be Sustained Simply Because the Agency Belatedly Included a So-Called "Variance Clause" Which Provides For "Less Flexibility" Than Congress Contemplated.

Once EPA decided to abandon Congress' "guidelines for effluent limitations," the Agency apparently sensed the need at least to simulate flexibility in the permit-issuing process. Accordingly, in the final regulations for each industrial category, EPA belatedly included a so-called "variance clause" which purports to allow adjustment of the nationwide limitations "for certain plants" in each industry. *See* p. 15, *supra.*

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[41] Two additional courts of appeals have recently invalidated expedient EPA interpretations requiring the imposition of similar programs in other States. *See* Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. granted,* No. 75-909, 44 U.S.L.W. 3681 (June 1, 1976); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted,* No. 75-1055, 44 U.S.L.W. 3682 (June 1, 1976).

As the courts have recognized, however, this "variance clause" by its terms provides far less latitude for consideration of the unique circumstances of individual plants than do the "guidelines for effluent limitations" which this amicus curiae brief maintains are required by the Act. Thus, the Third Circuit in *AISI* held that the

> "variance procedure provides for less flexibility than we believe Congress contemplated, since it permits deviations from otherwise rigid and unitary limitations only where the circumstances of the particular plant are 'fundamentally different' than those from which the effluent limitation was derived." 526 F.2d at 1046.

And even the Second Circuit, which accepted the "variance clause" in *NRDC, supra,* conceded that if EPA were required to identify a "range" and "specify factors" in the guidelines, "then arguably the 'variance' clause would not remedy the error." 8 ERC at 1990.

The Fourth Circuit in *du Pont II* went one step further. Although nominally upholding the "variance clause," the court ruled that "[s]ome of the specified factors are of practical applicability only to individual plants," and, accordingly, "construe[d] the congressional intent to be that the specified factors shall be applied by the permit issuer in determining whether the presumptively valid effluent limitations should apply to a particular source of discharge." 8 ERC at 1723.

Paradoxically, the *du Pont II* court hesitated to follow its own interpretation to the ineluctable conclusion that EPA's unduly restrictive "variance clause"

is unlawful and invalid. Thus, the court reserved any ruling on the mistaken theory that "the provisions of the statute and those of the regulations are of no present concern," and that "[t]he administration of these provisions in practice is a matter of speculation at the present." *Id.* at 1722.

But unless the "variance clause" is invalidated now as providing far "less flexibility" than "Congress contemplated," *AISI*, 526 F.2d at 1046, it will frustrate practical implementation of even the Fourth Circuit's more pragmatic reading and inevitably encourage a flood of individual plant appeals to the federal courts under Section 509(b)(1) of the Act.

For the truth is that EPA's "variance clause" merely simulates individual plant flexibility where none actually exists. By its terms, the clause would permit an exception only for factors "fundamentally different from the factors considered in the establishment of the guidelines." And since EPA purported to consider even site-specific factors such as plant age, size, processes and the like in development of its "effluent limitations guidelines," few, if any, circumstances exist in which an exception would be granted under EPA's clause.

In fact, as far as API is aware, *no* exceptions under the Agency's "variance clause" have been granted to any of the Nation's more than two hundred petroleum refineries. Nor is API aware of variances granted in any other industry.

As a result, the *du Pont II* court's hesitance to invalidate the "variance clause" serves only to prolong the present uncertainty at considerable cost to the federal judiciary. For if the "variance clause" were invalidated, and EPA forced to implement its "effluent limitations guidelines" as flexible guidelines along the lines intended by Congress, the many hundreds of outstanding permit disputes could be resolved by State and EPA permit officials without resort to the courts.

But so long as EPA's restrictive "variance clause" remains in force, permit-issuing authorities will be deprived of discretion to resolve the vast majority of disputed permits. And once the administrative process is concluded, individual plants denied permits tailored to their specific circumstances will be left with no choice but to appeal to the appropriate court of appeals under Section 509(b)(1) of the Act.

In short, far from saving EPA's otherwise unlawful "effluent limitations guidelines," the Agency's so-called "variance clause" constitutes a major barrier to individual plant permit flexibility deemed essential by the courts of appeals. Only by invalidating the "variance clause" as providing far "less flexibility" than Congress intended, will this Court restore the discretion afforded by Section 304(b) and prevent a multitude of individual plant appeals to the courts of appeals.

CONCLUSION

For the foregoing reasons, this Court should: (i) reverse the Fourth Circuit's decision in *du Pont II*; (ii) disapprove EPA's issuance of "effluent limitations guidelines" as rigid, single-number existing plant standards; (iii) invalidate EPA's so-called "variance clause" as providing far less flexibility than Congress intended; (iv) require EPA immediately to implement its current regulations along the lines of the flexible "guidelines for effluent limitations" mandated by Section 304(b); and (v) require EPA, as soon as practicable, to revise its regulations to provide a "range" of feasible discharge levels and to "specify factors" for tailoring effluent limitations to the circumstances of individual plants in the permit-issuing process.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1473

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Petitioners,

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Respondent,

No. 75-1705

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Cross-Petitioner,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Cross-Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Fourth Circuit

MOTION OF APPALACHIAN POWER COMPANY, ET AL. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE

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On Writs of Certiorari to the United States
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MOTION OF APPALACHIAN POWER COMPANY, ET AL., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Appalachian Power Co., *et al.*, (Electric Utilities)[1] hereby respectfully move, pursuant to Rule 42 of the

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[1] Electric Utilities consist of the 74 publicly and privately owned electric utilities listed at pp. 23-25 of the attached Brief.

Court, for leave to file the attached brief as amici curiae in the above-captioned consolidated cases.

Counsel for the government (Respondent in No. 75-1473, Cross-Petitioner in No. 75-1705) has consented to the filing of this brief.[1] We are advised that counsel for du Pont, *et al.*, (Petitioners in No. 75-1473, Cross-Respondent in No. 75-1705) will take no position with respect to this motion.

In support of this motion Electric Utilities state as follows:

1. On July 16, 1976, the day on which du Pont, *et al.* filed their briefs in these cases,[2] the Fourth Circuit issued its opinion in *Appalachian Power Co.* v. *Train,* Nos. 74-2096, *et al.,* (4th Cir., July 16, 1976), an appeal brought by Electric Utilities to review the regulations promulgated by EPA for the steam electric industry pursuant to the Federal Water Pollution Control Act.

2. The Fourth Circuit's opinion in *Appalachian Power* includes holdings which are identical to those in *E. I. du Pont de Nemours & Co., et al.,* v. *Train,* Nos. 74-1261, *et al.,* (4th Cir. March 10, 1976) (*du Pont II*), challenged by du Pont, *et al.,* as Petitioners in No. 75-1473, and the government as Cross-Petitioner in No. 75-1705. As amici respondents, Electric Utilities in their brief would urge this Court to affirm in full the challenged holdings of the Fourth Circuit in *du Pont II.*

3. Electric Utilities essentially agree with the Fourth Circuit's resolution of the jurisdictional issue.

[1] The government's consent is attached as the Appendix to the motion.

[2] See *infra* note 5.

While their reasons differ from those advanced by the government, Electric Utilities therefore agree with the government's conclusion that the courts of appeals have jurisdiction to review effluent limitations guidelines. However, since another amicus is supporting the jurisdictional holding of the court below, Electric Utilities, if permitted to file their brief as amici curiae, will address only the Fourth Circuit's holdings that (1) EPA regulations are "presumptively applicable" and (2) EPA must include an "escape clause" in its new source regulations.[4] To the best of Electric Utilities knowledge, these arguments have not been prsented, and will not be presented, by the parties or any other amicus in this case or in the related case, *du Pont I,* No. 75-978. Electric Utilities believe that presentation of these arguments may materially aid this Court's resolution of the difficult issues before it in these cases.

4. The attached brief is being filed within the time prescribed for filing Respondent's brief in *du Pont II* and is being filed prior to the date that the government plans to file its brief as "Cross-Petitioner-Respondent."[5]

[4] As amici in *du Pont II* when it was before the court below, Electric Utilities argued that EPA's regulations are only "presumptively applicable." The Fourth Circuit essentially adopted Electric Utilities' position in its *du Pont II* decision.

[5] The deadline for filing a petitioner's brief in *du Pont II* was August 6, 1976. du Pont, *et al.*, filed their briefs as Petitioners in *du Pont I* and as Petitioners-Cross-Respondents in *du Pont II* on July 16, 1976, the date their brief was due in *du Pont I.* The government has requested and was granted an extension from August 16 to September 4 within which to file its briefs. Apparently the government will not file a separate brief in its Cross-Petition and will file, on September 4, a single brief as "Cross-Petitioner-Respondent," in *du Pont II.*

WHEREFORE, Appalachian Power Co., *et al.* respectfully request that this motion be granted and that the attached brief amici curiae be filed with the court.

Respectfully submitted,

GEORGE C. FREEMAN, JR.
A Member of the Bar
of this Court

Counsel for Movants
Appalachian Power Co., *et al.*

APPENDIX TO MOTION

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

August 16, 1976

Michael B. Barr, Esq.
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Re: DU PONT v. TRAIN, Nos. 75-1473 AND 75-1705

Dear Mr. Barr:

I hereby consent to your filing a brief amicus curiae in the above captioned cases on behalf of Appalachian Power Co., et al.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

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39 Fed. Reg. 36186 (1974) 2, 5, 16

40 C.F.R. §§ 124.31-124.37 (1975) 19

40 C.F.R. §§ 125.31-125-35 (1975) 19

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1473

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Petitioners,

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Respondent,

No. 75-1705

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency,
Cross-Petitioner,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Cross-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF APPALACHIAN POWER COMPANY, ET AL., AS AMICI CURIAE

INTEREST OF AMICI

Amici, Appalachian Power Co., *et al.* (Electric Utilities),[1] urge this Court to affirm in full the decision of the Fourth Circuit in *du Pont II*.[2] Electric Utilities are both publicly and privately owned, and they own and operate over 50% of the nation's electric generating capacity. They participated actively in the Environmental Protection Agency's (EPA's or the Agency's) rulemaking proceeding which defined the "best" technology for existing and new sources in the steam electric industry,[3] appeared as amici curiae before the Fourth Circuit in both *du Pont* cases,[4] and also sought Fourth Circuit review of the regulations governing their own industry in *Appalachian Power Co.* v. *Train*.[5]

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[1] The Electric Utilities on whose behalf this brief is filed are listed *infra* pp. 23-25.

[2] E. I. du Pont de Nemours & Co., *et al.*, v. Train, Nos. 74-1261, *et al.*, 8 E.R.C. 1718 (4th Cir., March 10, 1976).

[3] Proposed regulations for the steam electric industry were published on March 4, 1974, 39 Fed. Reg. 8294. Final regulations were promulgated seven months later, 39 Fed. Reg. 36186 (October 8, 1974).

[4] E. I. du Pont de Nemours & Co., *et al.* v. Train, 528 F.2d 1136 (4th Cir. 1975) (*du Pont I*); *du Pont II*, *supra* note 2. In their briefs in these consolidated cases, Electric Utilities urged resolution of the jurisdictional issue independent of the questions regarding the Administrator's authority under sections 301 and 304(b) of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (Supp. IV, 1974) (FWPCA or the Act). Electric Utilities' arguments focused on the effect of the regulations and the necessity for flexibility in application of EPA's existing and new source regulations.

[5] Nos. 74-2096, *et al.* (4th Cir., July 16, 1976) (*Appalachian Power*). The Fourth Circuit's opinion is set forth in the Appendix (hereinafter App.) to this brief. It should be noted that Electric Utilities, in part responding to the court's invitation, have filed a motion for modification and clarification of certain parts of that opinion. If this motion is granted, the opinion as reported may differ in minor respects from that in the Appendix.

Electric Utilities have a narrow but vital interest in this case. Their position is simple: EPA's authority to implement the FWPCA standards[6] through general rules does not abrogate its obligation to heed the statutory standard of "best" technology in each case. If rigid application of a general regulation would contravene the statute in a specific situation, the rule cannot be validly applied to that situation. Thus, the application of the Agency's general regulations defining "best" technology for classes of existing and new sources requires a "safety valve" to deal with anomalous situations. This reasoning is reflected in the Fourth Circuit's holdings in *du Pont II* that EPA's regulations are "presumptively applicable" and that the new source regulations must include a "safety valve."[7] It is also consistent with recognized principles of administrative law and the regulatory scheme established by the FWPCA.

Apart from the fundamental principles which make a "safety valve" a necessary corollary of rules of general applicability, the factual record developed in the electric utility industry rulemaking established, for that industry, the need for the flexibility that a "safety valve" would provide. More than perhaps any other industry, the electric utility industry's production, location, and design options for new plants are severely

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[6] FWPCA §§ 301, 306. For convenience, all references will be to the section numbers of the FWPCA rather than the United States Code; citations to both appear in the Table of Citations.

[7] *du Pont II*, Slip Op. at 18-20, 8 E.R.C. at 1722.

constrained. Its production requirements, and thus the need for new power plants, are dictated by its obligation to provide adequate and reliable electric service. Technological constraints (*e.g.*, transmission capability) leave only a limited number of sites available for these plants. Site selection and plant design involve inevitable economic and environmental trade-offs with long-term consequences. Water pollution controls, for example, can exacerbate, both directly and indirectly, air pollution, solid waste, land use, and water supply problems.[8]

Congress recognized in the FWPCA the necessity that "best" technology take into account economic and environmental consequences. Sound environmental planning demands that the inevitable trade-offs be aimed at the socially optimal use of our limited national resources.

If Congress' command in the FWPCA for "best" technology is to be fulfilled in the electric utility industry, and in other industries, it is essential that permit applicants be afforded an opportunity to show that EPA's categorical new source standards should not be blindly applied in inappropriate cases.

Electric Utilities have vigorously asserted these fundamental legal principles and practical realities before the Agency and the courts. Their extensive comments on EPA's proposed steam electric regulations

[8] Some control devices result in direct air emissions; other treatment processes leave a solid residue. In some cases control mechanisms also reduce plant efficiency, with the result that more fuel must be extracted and consumed to produce the same net amount of electricity for the public. Thus, in addition to the obvious economic impact on consumers, reduced efficiency leads to increased air emissions and increased demand for basic fuels.

demonstrated both the immense diversity within this vital public service industry and the practical impossibility of EPA's foreseeing all of the factual circumstances to which its general rules will apply. Although apprised of these circumstances, EPA nonetheless failed to adopt a variance provision for new sources, apparently in the mistaken belief that a congressional desire for national uniformity demands undeviating rigidity. EPA established a categorical set of single number and "no discharge" standards for all new sources and provided no exception for those cases in which application of the rules would be inappropriate.[9]

As amici below, Electric Utilities argued in an unavoidably abstract context, since the record of EPA's electric utility rulemaking was not before the court, that EPA's regulations are only "presumptively applicable." The Fourth Circuit essentially adopted Electric Utilities' position in its *du Pont II* decision. As petitioners in *Appalachian Power,* Electric Utilities reiterated the necessity for flexibility in the concrete factual context of EPA's steam electric industry rulemaking record.

One month ago, on July 16, 1976, the Fourth Circuit reaffirmed its *du Pont II* holdings in *Appalachian Power,* an opinion that gave further insight into its reasoning on this issue.[10] The court sustained Electric Utilities' positions that (1) the courts of appeals have jurisdiction to review EPA's existing source regulations under section 509(b)(1) of the FWPCA,[11] (2)

[9] See 39 Fed. Reg. at 36201, 36204, 36207 (1974).

[10] The court also decided additional issues not raised in the instant case.

[11] Slip Op. at 8 n.12, App. at 6a n.12.

EPA's existing and new source regulations are only "presumptively applicable" in permit proceedings,[12] and (3) EPA should be required to adopt a limited "escape clause" for applying its new source standards.[13] Petitioners in No. 75-1473 and Cross-Petitioner in No. 75-1705 now challenge holdings identical to those of the Fourth Circuit in *Appalachian Power*.[14] Electric Utilities believe that this Court should reject these challenges and affirm the decision of the Fourth Circuit.

Electric Utilities essentially agree with the Fourth Circuit's resolution of the jurisdictional issue. However, since another amicus is supporting the Fourth Circuit's jurisdictional holding, Electric Utilities will address only the Fourth Circuit's holdings that (1) EPA regulations are "presumptively applicable" and (2) EPA must include an "escape clause" in its new source regulations.

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[12] *Id.* at 16, App. at 11a.

[13] *Id.* at 16-19, App. at 11a-14a.

[14] Although petitioners in *du Pont I* and *du Pont II* sought writs of certiorari on the question of the court of appeals' jurisdiction to review the existing source regulations, from their briefs it appears that they believe that the Fourth Circuit's assertion of jurisdiction on this case should be affirmed on the basis of a "pendent jurisdiction" theory. Brief for Petitioners at 12-13, *du Pont II;* Brief for Petitioners at 94-96, *du Pont I.*

ARGUMENT

I. THE FOURTH CIRCUIT'S RULINGS REGARDING THE "PRESUMPTIVE APPLICABILITY" OF EPA'S REGULATIONS AND THE CONSEQUENT NECESSITY FOR A "SAFETY VALVE" IN APPLYING THOSE REGULATIONS ARE PREMISED UPON AND SUPPORTED BY ESTABLISHED JUDICIAL DOCTRINE.

Many federal regulatory statutes authorize regulatory agencies to implement qualitative statutory standards, such as the FWPCA's "best technology" standards, through rules of general applicability.[15] Such standards in authorizing legislation circumscribe the power of the particular agency and define the congressional ends toward which the exercise of rulemaking authority must be directed.[16] In establishing uniform regulatory criteria which implement qualitative statutory standards, an agency must rely in large part upon generalized assumptions and conclusions. In complex factual areas general assumptions and conclusions may not always hold true in specific instances. As a result, valid general rules, when applied in particular

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[15] *See, e.g.*, Federal Communications Act of 1934, 47 U.S.C. § 303 (1970) (authorizing the Federal Communications Commission to engage in certain specific activities "as public convenience, interest, or necessity requires"); Natural Gas Act, 15 U.S.C. § 717d(a) (1970) (authorizing the Federal Power Commission to "determine the just and reasonable rate, charge, classification, rule, regulation practice, or contract" to be observed by natural gas companies); Food, Drug and Cosmetic Act, 21 U.S.C. § 341 (1970) (authorizing the Secretary of the Food and Drug Administration to take certain specific types of actions whenever, in his judgment, such actions "will promote honesty and fair dealing in the interest of consumers").

[16] *See generally* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); *see also* South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974).

cases, may be inconsistent with, or even contrary to, the statutory standards which must govern the agency's actions.

This Court has long recognized the distinction between the validity of a statute on its face and its validity as applied, and it has permitted challenges to both. As the Court stated in *United States* v. *Carolene Products Co.*: "[W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied . . . is without support in reason . . . ."[17] In other words, a person has the right to challenge the application of a statute to his activities and to have his claim heard. Just as statutes are bounded by constitutional limits, so are regulations bounded by the statutory standards they were promulgated to implement. Thus, just as an individual has the right to challenge the constitutional validity of a statute as applied to his situation, so must he also have the right to challenge the *statutory* validity of a regulation as applied to his particular situation. An agency, like a court, must consider such narrow but crucial challenges when made at the time the rules are applied to the individual.[18] The Fourth Circuit's holding that EPA's regulations are "presumptively applicable" is an affirmation of this principle.[19]

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[17] 304 U.S. 144, 153-54 (1938).

[18] *Cf.* WAIT Radio v. FCC, 418 F.2d 1153 (D.C.Cir. 1969). This limited right to seek an exception for the anomalous situation is clearly distinguished from the permissible imposition of statutory time limits on the individual's right to challenge the general validity of a generic rule. See *infra* pp. 9-11.

[19] The regulatory structure and judicial review provisions of the FWPCA are fully consistent with this principle. See *infra* Part II.

In holding that EPA's "best" technology regulations for new and existing sources are only "presumptively applicable," the court below recognized the principle that flexibility in the application of general rules is most sorely needed in emerging, highly complex regulatory areas. It is in these areas that discrete situations are most likely to exhibit facts significantly different from those upon which the general rules are premised. Application of the general rules to such factual situations may produce results which are "without support in reason"[20] and contrary to the statutory standards the rules are designed to implement. To prevent such an occurrence and to preserve the right of an interested party to challenge the application of EPA's regulations to his situation, the Fourth Circuit properly concluded that EPA's new source regulations must include an "escape mechanism", and then proceeded to review the validity of those regulations on the assumption that they are only "presumptively applicable."[21]

In *United States* v. *Allegheny-Ludlum Steel Corp.*,[22] *Permian Basin Area Rate Cases*,[23] *United States* v. *Storer Broadcasting Co.*,[24] and *National Broadcasting Co.* v. *United States*,[25] this Court was asked to rule

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[20] *Carolene Products*, 304 U.S. at 154.

[21] *du Pont II*, Slip Op. at 18-20, 8 E.R.C. at 1722. In *Appalachian Power* the Fourth Circuit premised its validation of certain of EPA's challenged actions on the court mandated "safety valve." Slip Op. at 80-82, App. at 52a-53a.

[22] 406 U.S. 742 (1972).

[23] 390 U.S. 747 (1968).

[24] 351 U.S. 192 (1956).

[25] 319 U.S. 190 (1943).

upon the validity of general regulations which translated qualitative statutory standards into objective terms.[26] In reviewing these regulations the Court recognized that an administrative agency has the authority to waive its rules when their application would produce results inconsistent with the statutory objective. This principle was most recently articulated in *Allegheny-Ludlum*:

> It is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances."[27]

These decisions, however, go beyond mere recognition of the existence of waiver authority. They are also premised upon recognition that when an agency exercises its authority to proceed in complex areas by a general rule which, as applied, may be inconsistent with the overriding statutory standard, it has an obligation to exercise its "concomitant authority" to entertain waiver requests. Thus, in *Storer* and *Allegheny-Ludlum* the fact that the agencies had exercised their "concomitant authority" through promulgation of waiver provisions was a crucial factor in the Court's sustaining the validity of the generally applicable reg-

[26] In *Allegheny-Ludlum*, the challenged rules required that unloaded railroad freight cars be returned in the direction of the line owning the cars; in *Permian* they set maximum area rates for natural gas producers' interstate sales; in *Storer* they provided that no license to operate a television station would be granted to an applicant who already owned five or more such stations; and in *National Broadcasting* they related to "chain broadcasting" problems.

[27] 406 U.S. at 755.

ulations."[28] In *National Broadcasting* and *Permian* the Court placed similar reliance upon the agencies' express policies of granting waiver under certain conditions."[29]

It was in *National Broadcasting* that the Court first emphasized the importance of flexibility in sustaining an agency's general rules:

> The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.[30]

Later in *Storer*, the Court again recognized the "*necessity* for flexibility" to sustain general rules it had previously emphasized in *National Broadcasting*.[31] It held that the Federal Communications Commission's explicit waiver provision supplied the requisite flexibility to validate the general regulations challenged there.[32]

[28] *Storer*, 351 U.S. at 202 n.10, 204-05; *Allegheny-Ludlum*, 406 U.S. at 748, 755.

[29] *National Broadcasting*, 319 U.S. at 207, 225; *Permian*, 390 U.S. at 764, 771-72.

[30] 319 U.S. at 225.

[31] 351 U.S. at 204 (emphasis added).

[32] The Court in *Storer* found that the waiver provision present

The Court in *Permian* also stressed the need for flexibility in the application of rules.[33]

Lower court decisions have continued to rely upon the "necessity for flexibility" concept first enunciated in *National Broadcasting*. In *WAIT Radio* v. *FCC*, the United States Court of Appeals for the District of Columbia stated:

> The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application based on special circumstances. . . . [A] system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties.[34]

The Second Circuit recently relied upon this principle in upholding the limited variance provision contained in EPA's existing source regulations under the

in that case was crucial to the regulations' legality not only because it provided the required flexibility as to application but also because it left open an avenue through which an applicant for a license might exercise the right—guaranteed him in the organic statute—to an adjudicatory hearing on his application. This supplemental holding did not result in any less emphasis on the need for flexibility in applying regulations. The Court said, "In the *National Broadcasting* case we called attention to the necessity for flexibility in the Rules there involved," 351 U.S. at 204, then quoted that earlier decision at some length, and concluded, "That flexibility is here under the present § 309(a) and (b) [waiver provisions] and the FCC's regulations," *id.* at 205. This language and this Court's continued attention to the need for flexibility indicate that the "adjudicatory right" facet of *Storer* does not supplant or even undermine the "necessity for flexibility" facet. See *infra* note 55. Each is an independent, valid ground upon which a court may insist on a "safety valve" to uphold agency regulations.

[33] *Permian*, 390 U.S. at 770-73.

[34] 418 F.2d 1153, 1157 (D.C. Cir. 1969).

FWPCA. Rejecting the argument that such a variance provision is an "impermissible derogation from the Congressionally mandated goal of national uniformity," the court observed: "Without variance flexibility [in those regulations], the [regulatory] program might well founder on the rocks of illegality."[35] The decision of the court below is merely another expression of that principle and fully comports with the decisions of this Court.

II. THE FOURTH CIRCUIT'S HOLDINGS ARE CONSISTENT WITH, AND COMPELLED BY, THE PROVISIONS OF THE FWPCA.

The FWPCA establishes a two-stage regulatory structure—the first, adoption of general rules for classes and categories of discharge sources;[36] the second, application of those rules to individual dischargers through a permit program.[37] Judicial review is provided but it must be secured at the time of agency action; with limited exception, judicial review is foreclosed thereafter.[38]

This structure assures that general national pollution control regulations will be subject to expeditious application and enforcement. Matters resolved in the rulemaking cannot be re-litigated in the permit pro-

[35] NRDC v. EPA, No. 74-1258, 8 E.R.C. 1988, 1992 (2nd Cir., April 28, 1976).

[36] FWPCA §§ 304(b), 306.

[37] FWPCA § 402(a), (b).

[38] Under section 509(b)(1) of the FWPCA an action to review the Administrator's promulgation of effluent limitations must be brought within ninety days, unless the action is based solely on "grounds which arose" after the ninetieth day.

ceedings. Matters resolved at either of these stages cannot be re-litigated in civil and criminal enforcement proceedings.[39] The heart of the controversy before the Court is: Which matters are resolved at each stage and, in particular, at what time and in what manner are anomalous individual factual situations to be considered in the FWPCA regulatory scheme?

A. The EPA rulemaking process

Though largely inexperienced in wastewater treatment technologies, EPA was commanded by section 306 to establish, within nineteen months, new source standards for twenty-seven industrial categories. The standards for each category were to reflect effluent reductions achievable with "best available demonstrated control technology, processes, operating methods or other alternatives."[40] Defining best technology for *twenty-seven industries* in *nineteen months* is not a schedule which is conducive to the promulgation of finely tuned standards.[41] Nevertheless, the legislative

[39] Section 509(b)(2) provides that actions of the EPA Administrator reviewable under section 509(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." Sections 309 ("Federal Enforcement") and 505 ("Citizen Suits") authorize enforcement actions in federal district courts. Under section 309 the court may assess fines of up to $10,000 per day for each violation in civil actions and, in criminal actions, it may impose penalties of up to $25,000 per day and/or one year's imprisonment. The $10,000 civil fines may also be levied in section 505 citizen suits.

[40] FWPCA § 306(a)(1), (b)(1).

[41] The Agency's task was made even more difficult by the district court's action in NRDC v. Train, No. 1609-73, 6 E.R.C. 1033 (D.D.C. November 15 and 27, 1973), *aff'd in part*, 510 F.2d 692 (D.C. Cir. 1975), which mandated promulgation of effluent guidelines within a time period clearly inconsistent with consideration

history indicates that section 306 regulations were to establish a mechanism for uniform application of technology requirements[42] which, according to the Act's text, must be both "best"[43] and "demonstrated" for types, sizes, and classes of new sources within an industrial category.[44] Theoretically, if EPA could have foreseen all of the factual settings to which these standards would apply, it could have identified the numerous potentially different types, sizes, and classes of sources within each industrial category and then defined "best technology" for each. But realistically, EPA could not and did not attempt this approach.

As for the electric utility industry, EPA used general assumptions regarding, for example, source water, industrial process, climatology, siting and capital costs and, on this basis, identified hypothetical "costs," "non-water quality environmental impacts," and "energy requirements"[45] associated with alleg-

of all of the factual variations within each industrial category. *See* Hooker Chemicals v. Train, No. 74-1687, 8 E.R.C. 1961, 1965 (2d Cir., April 28, 1976). Since EPA's new source standards were based on the same factual record as the effluent guidelines, and EPA had thus determined to issue them concurrently, the practical effect of the court's holding was to put the Agency under a mandate to issue its new source standards within the same restricted timeframe.

[42] S. Rep. No. 1236, 92d Cong., 2d Sess. 127-28 (1972); H.R. Rep. 911; 92d Cong. 2d Sess. 110-11 (1972); S. Rep. No. 414, 92d Cong. 1st Sess. 57-60 (1971).

[43] See *infra* note 45.

[44] Section 306(b)(2) provides that the Administrator "may distinguish among classes, types, and sizes within categories of new sources" in establishing new source standards.

[45] Section 306(b)(1)(B) requires EPA to consider these facts in establishing any section 306 standards. Their consideration is crucial in determining whether a particular technology is "best." Portland

edly "demonstrated" technologies. These hypothetical impacts and costs, in turn, were compared and balanced to select a single definition of "best" technology for either very broad classes or even an entire industry.[44] Thus, EPA's standards did not reflect the factual variations within each industrial category and, therefore, could not represent the best technology for each facility within that category.

B. The dilemma facing the lower court

Faced with the reality of EPA rulemaking, the Fourth Circuit in *du Pont II* was presented with the following dilemma: What should be its role in reviewing standards which EPA asserted must be uniformly applied when it was impossible for the court, because of EPA's generalized assumptions, to determine whether those standards would reflect the best technology in individual cases?[45] To resolve the dilemma, the court had two alternatives:

1. Vacate the regulations and demand that the agency establish "best technology" standards for

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Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 385-86 n.42 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). Moreover, section 306 provides that any "no discharge" standard be adopted only if "practicable." The legislative history indicates that this language requires the Administrator "to show that the water quality benefits to be achieved from no discharge would be commensurate with the cost of such a no discharge standard." 118 CONG. REC. 33760 (1972) (remarks of Mr. Wright).

[44] *See, e.g.*, the focus on "national-scale" problems in EPA's statements of consideration for the proposed and final steam electric industry regulations. 39 Fed. Reg. at 8294 (1974); 39 Fed. Reg. at 36187 (1974).

[45] This dilemma has troubled other courts charged with reviewing EPA's regulations. *See, e.g.*, Hooker Chemicals v. Train, No. 74-1687, 8 E.R.C. 1961, 1965 (2d Cir., April 28, 1976).

the almost innumerable classes, types, and sizes of sources which might be built in the future; or

2. Review the regulations on the basis of the assumptions, conclusions, and explanations in the rulemaking record but refuse to decide whether the rules would be valid as applied in all individual factual cases.

The Fourth Circuit chose the latter approach and held that it would review the regulations on the basis that they were only "presumptively applicable."[46] In so holding, the court gave effect to the congressional desire for uniformity by assuring that all sources with the characteristics assumed by EPA in its generic rulemaking would incorporate the best technology defined by the standard. Quite properly, however, it did not confuse Congress' desire for meaningful national uniformity with Procrustean intent. Rather, it held that the applicability of general rules, though not their validity for the class or category, could be challenged in individual permit proceedings.[47]

C. The Fourth Circuit's resolution of this dilemma comports with the FWPCA

As discussed in Part I, the Fourth Circuit's holding is fully supported by decisions of this Court in-

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[46] *du Pont II*, Slip Op. at 20, 8 E.R.C. at 1722. Certain of the more flagrant errors in EPA's use of generalized assumptions are subject to resolution in section 509(b)(1)(A) and (E) with review proceedings. However, more subtle errors associated with possible geographical variables or other unique circumstances cannot be resolved in such proceedings. *Compare, e.g., Appalachian Power*, Slip Op. at 43-57, App. at 30a-37a (effect of EPA's regulations on utilities located in arid areas) *with id.* at 80-81, App. at 52a-53a (unique problems of a utility located in an urban area).

[47] *du Pont II*, Slip Op. at 18-19, 8 E.R.C. at 1722.

volving agency regulations in less complex areas than those involved here. Moreover, the language and regulatory structure of the Act are fully consistent with the Fourth Circuit's conclusion that a claim of arbitrary action in the application of EPA's regulations "may be considered in court review under § 509 (b)(1)(E) of the issuance or denial of a permit . . . [where] specific facts may be presented and the problem will be actual rather than hypothetical." [50]

Under section 509(b)(1)(A) of the Act, it is the "action of the Administrator in promulgating" these regulations which may be challenged in the courts of appeals. Any such challenge to the validity of EPA's regulations must be initiated within ninety days of issuance of EPA's rulemaking order, and with limited exception, the validity of the rules is not thereafter subject to review. Given the statutory timing of such review proceedings, generally with only a notice and comment rulemaking record, it would be impossible for any court to determine in an appeal of the general rules whether the challenged regulations, when subsequently applied in individual cases, would result in requirements which fulfill Congress' call for best technology. Accordingly, the court below was correct in concluding that in section 509(b)(1)(A) appeals only issues relating to the "general validity" of EPA's regulations can be resolved.[51]

The court's holdings are also supported by the permit program and related judicial review provision

[50] *Id.* at 24, 8 E.R.C. at 1723. *See* NRDC v. EPA, No. 74-1258, 8 E.R.C. 1988 (2d Cir., April 28, 1976).

[51] *See du Pont II*, Slip Op. at 23, 8 E.R.C. at 1723.

of the Act." Those provisions establish a mechanism for the courts to resolve questions involving application of the general rule in specific cases. As this Court noted in *EPA* v. *California*, EPA's generally applicable effluent limitations and standards (for classes and categories of discharge sources) are to be "transform[ed] into the obligations of an individual discharger" " through section 402 permits—permits that can be issued only after opportunity for public hearings and in accordance with procedures that secure full public participation." In short, the "applicable requirements" mentioned in section 402 are to be ascertained in the permit proceedings. Thus, it is at this stage that the general regulations are to be applied to individual dischargers and it is at this stage that questions as to the general rules' applicability can and must be heard."

In permit proceedings, the individual discharger will be able to ascertain if special circumstances exist

[52] FWPCA §§ 402, 509(b)(1)(F).

[53] 44 U.S.L.W. 4781, 4782 (June 7, 1976).

[54] FWPCA §§ 101(e), 308(b), 402(b)(3), (j); 40 C.F.R. §§ 124.31-124.37 (1975); 40 C.F.R. §§ 125.31-125.35 (1975).

[55] EPA's new source regulations apply only to sources which are constructed on or after the date the proposed regulations were published. FWPCA § 307(a)(2). As a result, it is possible that the regulations will be applied in the future to new source owners who did not participate in the rulemaking since they were not then engaged in the particular industrial activity. Under these circumstances, mechanical application of new source regulations in permit proceedings, without any opportunity for a hearing on special facts and circumstances in appropriate cases, could create procedural due process problems. *Cf.* Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 638 n.1 (1973) (Powell, J., concurring); *Storer*, 351 U.S. at 205. See *supra* note 32.

which bring into question the validity of the rule as applied since the statute particularizes the factors that EPA must consider in adopting its regulations, and the rulemaking record leading to their adoption discloses the assumptions upon which they are based. When special facts and circumstances are placed before the agency responsible for issuing the permits, it can evaluate them in light of the statutory factors and rulemaking record and determine whether the facts justify a departure from the general rule in order to comply with the statutory standard. If such a departure is justified by the particular facts in an individual case, the permit issuer must tailor a precise effluent limitation meeting the section 306 requirement that each new source incorporate the "best available demonstrated technology."[56] After EPA has issued a permit or vetoed a permit issued by a state

[56] Section 306(e) provides that it is unlawful to operate a new source in violation of an "applicable" standard of performance. Once a source-specific section 306 performance standard is included in a permit, however, it supplants the regulations' prescribed standard, which is no longer applicable, and "[c]ompliance with [the] permit . . . shall be deemed compliance . . . with sections . . . 306. . . ." FWPCA § 402(k). Under section 309, violation of a permit condition "implementing" section 306 is subject to civil and criminal enforcement.

In its cross-petition, the government implied that section 306(d) somehow supported EPA's position that section 306 regulations must be applied in each permit without regard to special circumstances. Electric Utilities are at a loss to see the relevance of that section to the issue in this case. Section 306(d) merely provides that, if a source is constructed to meet the requirements of section 306, more stringent pollution control requirements cannot be imposed for ten years. The existence of a "safety valve" in no way relieves the discharger from compliance with section 306; it merely provides for the individual specification of applicable requirements in exceptional cases.

granted section 402 permit authority,[57] judicial review is clearly available under section 509(b)(1)(F). In such a review proceeding the courts will have an adequate record upon which to determine whether the agency's application, or waiver, of the rule was arbitrary and capricious on the facts and circumstances of the individual case.[58]

Finally, as the court below noted, "[t]he balance of general rule and narrow exceptions assures all possible uniformity without sacrifice of the flexibility needed to adjust for disparate plants in dissimilar circumstances."[59] The adoption of a variance provision with express criteria for entertaining, determining, and acting upon exception requests is needed to assure that the "obligations of individual dischargers" which are specified in permits will, in fact, uniformly reflect

[57] State-issued section 402 permits are subject to EPA review; they cannot be issued if EPA objects to their issuance "as being outside . . . the requirements of this Act." FWPCA § 402(d)(2).

[58] State-issued permits may be reviewable in state courts of general jurisdiction pursuant to state law. It is less clear whether they are also reviewable in federal courts of appeals. Section 509(b)(1)(E) provides for review of the action of the Administrator in "approving or promulgating any effluent limitation or other limitation under section . . . 306 . . . ." The Administrator's failure to object to the issuance of a permit which included conditions that the state determined were necessary to meet the requirements of section 306 may constitute "approval" of a section 306 effluent limitation within the meaning of section 509(b)(1)(E). *Compare* S. Rep. No. 1236, *supra* note 42 at 147-48 *with* S. Rep. No. 414, *supra* note 42 at 85 *and* S. 2770, 92d Cong., 1st Sess. § 509(b)(1) (1971). The only court of appeals to address the issue, however, has held that the Administrator's tacit approval of a state-issued permit is not subject to review under section 509(b)(1). Shell Oil Co. v. Train, No. 75-2070 (9th Cir., September 22, 1975), cited in Shell Oil Co. v. Train, No. C-75-1291, 8 E.R.C. 2018, 2021 (N.D. Cal., March 17, 1976).

[59] *du Pont II*, Slip Op. at 18-19, 8 E.R.C. at 1722.

the "best available demonstrated technology." [60] Such a provision would ensure that the permit-issuing agencies could not ignore, through slavish application of EPA's regulations, the statutory standard of section 306. It would not unduly complicate the regulation of new sources under section 402. Properly drawn, the provision could require that one seeking a variance allege facts showing that the regulations in question are inapplicable to his situation. The permit-issuing agency would be required to accept evidence on variance requests only from one who had made the requisite showing of inapplicability on the face of his request. Even then, he would have the burden of proving the "inappropriateness of the regulations as applied to him." [61]

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[60] Sections 301(c) and 316(a) of the FWPCA neither obviate the need for, nor reflect congressional disapproval of, the inclusion of such a variance clause in EPA's new source regulations. Under section 301(c) of the FWPCA, the owner of an existing source may be excused from complying with the 1983 best technology limitations *if* compliance is beyond the "economic capability" of the source and *if* a limitation can be established which will result in "reasonable further progress" toward the elimination of discharges. Under section 316(a) any thermal discharge limitation (including those necessary to meet water quality standards) may be relaxed *if* the source owner demonstrates that less stringent limitations will assure "protection and propagation of a balanced indigenous population of fish, shellfish and wildlife." Thus, both of these provisions establish single factor exceptions which override the general requirement that a source incorporate the best technology available. The type of variance at issue in this case would not excuse compliance with discharge limitations reflecting the best technology; it would only excuse a source from compliance with a *regulation* which, as applied, did not reflect the "best technology." See *supra* note 56 and accompanying text.

[61] Slip Op. at 15, App. at 10a; *see* Gulf Oil Corp. v. Hickel, 435 F.2d 440 (D.C. Cir. 1970).

In summary, given the practical inability of the EPA or the reviewing courts to foresee all the circumstances to which these rules will apply, some flexibility in their application is necessary to account for the unforeseen, exceptional cases. Without flexibility, dischargers could be subjected to inappropriate requirements and denied any meaningful opportunity to show the inappropriateness of those requirements under the particular facts of their respective cases. Thus, the Fourth Circuit's interpretation of the Act was correct from both legal and practical standpoints.

CONCLUSION

For the foregoing reasons the decision of the Fourth Circuit in *du Pont II* should be affirmed.

Respectfully submitted,

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THE CINCINNATI GAS & ELECTRIC COMPANY
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COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY
THE DAYTON POWER AND LIGHT COMPANY
OHIO EDISON COMPANY
THE TOLEDO EDISON COMPANY
NIAGARA MOHAWK POWER COMPANY
DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES

August 16, 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 74-2096, 74-2188, 74-2196,
74-2236, 74-2263, 74-2264,
74-2265, 74-2268, 74-2269,
74-2270, 74-2286, 74-2298,
74-2312, 74-2313, 74-2315,
74-2339, 74-2340, 74-2341,
74-2343, 74-2365, 74-2366,
74-2396, 75-1014, 75-1021,
75-1022, 75-1047, 75-1074,
75-1078, 75-1091, 75-1094,
75-1095, 75-1198, 75-1199,
75-1201, 75,1223, 75-1255,
75-1345, 75-1346, 75-1347

APPALACHIAN POWER COMPANY, BALTIMORE GAS AND ELECTRIC COMPANY, CAROLINA POWER & LIGHT COMPANY, DUKE POWER COMPANY, MONONGAHELA POWER COMPANY, OHIO POWER COMPANY, POTOMAC EDISON COMPANY, POTOMAC ELECTRIC POWER COMPANY, SOUTH CAROLINA ELECTRIC & GAS COMPANY, VIRGINIA ELECTRIC AND POWER COMPANY, WEST PENN POWER COMPANY,
Petitioners

v.

RUSSELL E. TRAIN, as Administrator
ENVIRONMENTAL PROTECTION AGENCY,
Respondent

ALABAMA POWER COMPANY, et al

JERSEY CENTRAL POWER & LIGHT COMPANY,
METROPOLITAN EDISON COMPANY and
PENNSYLVANIA ELECTRIC COMPANY,
Intervenors

ON PETITIONS FOR REVIEW OF ACTIONS OF THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY*

Argued September 23, 1975 Decided July 16, 1976

* The following Petitions for Review, all naming Train as Respondent, were consolidated:

74-2188—National Rural Electric Cooperative Association
74-2196—Georgia Power Company
74-2236—Tampa Electric Company
74-2263—Indiana & Michigan Electric Company
74-2264—Indiana-Kentucky Electric Corporation
74-2265—Illinois Power Company
74-2268—Pacific Gas and Electric Company
74-2269—San Diego Gas & Electric Company
74-2270—Southern California Edison Company, a California corporation
74-2286—Mississippi Power Company
74-2298—Arkansas Power & Light Company, and Arkansas-Missouri Power Company
74-2312—Gulf Power Company
74-2313—Alabama Power Company
74-2315—Boston Edison Company, Holyoke Water Power Company, Montaup Electric Company, New England Power Company, Public Service Company of New Hampshire, Western Massachusetts Electric Company
74-2339—Consolidated Edison Company of New York, Inc.
74-2340—Pennsylvania Power & Light Company
74-2341—Philadelphia Electric Company
74-2343—Florida Power & Light Company
74-2365—Dairyland Power Cooperative
74-2366—Commonwealth Edison Company
74-2396—Mississippi Power & Light Company, Louisiana Power & Light Company, and New Orleans Public Service, Inc.
75-1014—Western Farmers Electric Cooperative, a corporation
75-1020—Alabama Electric Cooperative, Inc.
75-1021—Buckeye Power, Inc., Indiana and Michigan Power Company, Kentucky Power Company, Ohio Electric Company, Ohio Power Company, Ohio Valley Electric Corporation

Before RIVES** and BREITENSTEIN***, Senior Circuit Judges, and WIDENER, Circuit Judge.

George C. Freeman, Jr. and (Hunton, Williams, Gay and Gibson on brief) for Appalachian Power Company, Boston Edison Company, Florida Power and Light Company, New

75-1022—Brazos Electric Power Cooperative, Inc.
75-1047—Connecticut Light & Power Company, The Hartford Electric Light Company, Western Massachusetts Electric Company, Long Island Lighting Company, New York State Electric & Gas Corporation (Intervenors)
75-1074—Corn Belt Power Cooperative
75-1078—Texas Utilities Generating Company, Dallas Power & Light Company, Texas Electric Service Company, Texas Power & Light Company
75-1091—Public Service Electric & Gas Company
75-1094—Union Electric Company
75-1095—Central Iowa Power Cooperative
75-1198—South Texas Electric Cooperative, Inc.
75-1199—Central Power & Light Company and West Texas Utilities Company
75-1200—State of Texas
75-1201—Houston Lighting & Power Company
75-1202—Tennessee Valley Authority
75-1203—Brazos River Authority
75-1223—Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, Columbus & Southern Ohio Electric Company, Dayton Power & Light Company, Ohio Edison Company, Toledo Edison Company
75-1255—Union Electric Company, a Missouri Corporation
75-1345—Platte River Power Authority
75-1346—City of Lamar, a municipal corporation of the State of Colorado, and The Lamar Utilities Board
75-1347—Tri-State Generation and Transmission Association, Inc.

** Of the Fifth Circuit, sitting by designation.

*** Of the Tenth Circuit, sitting by designation.

England Power Company, Pacific Gas and Electric Company, Public Service Company of New Hampshire, San Diego Gas and Electric Company, Southern California Edison Company, and Virginia Electric and Power Company; Edward J. Sack and (Joyce P. Davis on brief) for Consolidated Edison Company of New York, Inc.; Linda Aaker for State of Texas; Turner T. Smith, Jr., (William A. Anderson, II, Andrea S. Bear, Hunton, Williams, Gay and Gibson on brief) for Appalachian Power Company; Charles B. McGregor and (Beard and Kultgen on brief) for Brazos River Authority; Spencer C. Relyea, (Worsham, Forsythe and Sampels on brief) for Texas Utilities Generating Company; Robert W. Harmon for Appalachian Power Company, Indiana and Michigan Electric Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Electric Company, Ohio Power Company; (Dale G. Stoodley on brief) for Boston Edison Company; (William H. Green on brief) for Florida Power and Light Company; (Philip H. R. Cahill on brief) for New England Power Company; (John B. Gibson on brief) for Pacific Gas and Electric Company; (Russell A. Winslow on brief) for Public Service Company of New Hampshire; (Guenter S. Cohn on brief) for San Diego Gas and Electric Company; (Charles R. Kocher on brief) for Southern California Edison Company; (John Goldsum, Mary Joe Carroll, Clark, Thomas, Winters and Shapiro on brief) for Central Power and Light Company and West Texas Utilities Company; (Erle Nye on brief) for Dallas Power and Light Company; (J. A. Gooch, Cantey, Hanger Gooch, Cravens and Munn on brief) for Texas Electric Service Company; (H. Sam Davis, Jr., Burford, Ryburn and Ford on brief) for Texas Power and Light Company; Ray McDevitt, Attorney, Environmental Protection Agency, Thomas F. Bastow, Attorney, United States Department of Justice, (Wallace H. Johnson, Assistant Attorney General, Edmund B. Clark, Alfred T. Ghiorzi, Attorneys, United States Department of Justice, Robert V. Zener,

General Counsel, Bruce M. Diamond, Attorney, Environmental Protection Agency, on brief) for Respondent, Russell E. Train.

WIDENER, Circuit Judge:

This action is brought under § 509(b)(1)[1] of the Federal Water Pollution Control Act [Act][2] and seeks review of certain regulations promulgated by the Environmental Protection Agency (EPA) pursuant to its authority under §§ 301, 304, 306 and 316(a).[3] These regulations establish limitations on the discharge of heat from steam electric generating plants into navigable waters.[4] The petitioners in this action include seventy members of the United Water Act Group [UWAG], who include both publicly and privately owned companies and collectively own and operate over 50% of the nation's electric generating capacity.

The regulations here under review implementing §§ 301, 304, and 306 were first issued in preliminary form on March 4, 1974.[5] The proposed regulations under § 316(a) of the Act were issued on March 28, 1974.[6] Following a comment period, EPA issued its final regulations on Octo-

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[1] 33 USC § 1369.

[2] 33 USC § 1251 et seq.

[3] 33 USC §§ 1311, 1314, 1316, and 1326(a).

[4] Navigable waters under the Act are defined as "the waters of the United States, including the territorial seas." 33 USC § 1362(7). In addition, it should be noted that certain of the regulations challenged also regulate ash disposal and construction runoff from power stations.

[5] 40 CFR Part 423; 39 Fed. Reg. 8294 et seq. (1974).

[6] 40 CFR Part 122; 39 Fed. Reg. 11434 et seq. (1974).

ber 8, 1974.[7] Prior to that time, however, the first of the petitions in this case was filed with the Court.[8]

The Act establishes as the national goal the elimination of discharges of pollutants into navigable waters by 1985.[9] Among the substances defined as a pollutant by Congress was heat.[10] It was recognized, however, that a basic technological approach to water quality control could not be applied in the same manner to the discharge of heat as to other pollutants since the temporary localized effects of thermal discharges might, in certain instances, be beneficial.[11] Thus, Congress included within the Act § 316(a) which modifies the requirements of both sections 301 and 306 as they pertain to thermal discharges from point sources.

In the instant case, the petitioners challenge the regulations generally and specifically.[12] For the sake of clarity, we will first consider the general challenges and then discuss those applying to specific regulations.

STANDARD OF REVIEW

Before addressing the issues raised by the Industry, it is important to note that the standard of review imposed

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[7] 40 CFR Part 423; 39 Fed. Reg. 36186 et seq. (1974) as amended at 40 Fed. Reg. 7095 (1975); 40 CFR Part 122; 39 Fed. Reg. 36176 et seq. (1974).

[8] The EPA brief states final regulations were announced to the press on October 2, 1974, the same day as the initial petition was filed in this court.

[9] Section 101(a)(1); 33 USC § 1251(a)(1).

[10] Section 502(6); 33 USC § 1362(6).

[11] 1 Leg. His. 264.

[12] No question is raised as to the jurisdiction of the court to hear this case, the parties being of opinion that jurisdiction may properly be invoked pursuant to § 509(b)(1). This is consistent with our opinion in *duPont* v. *Train*, No. 74-2237 (4th Cir. 1975), and, thus, need not be considered here.

upon the court is narrowly prescribed by Section 706(2)(A) of the Administrative Procedure Act.[13] That section requires a finding that the administrative action in question is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" before it may be set aside. The scope of review thus permitted was discussed by this court in *Appalachian Power Co.* v. *EPA*, 477 F2d 495 (4th Cir. 1973). There, we stated:

> "Courts require that administrative agencies 'articulate the criteria' employed in reaching their result and are no longer content with bare administrative *ipse dixits* based on supposed administrative expertise. . . . While an agency may have discretion to decide, '[D]iscretion to decide does not include a right to act perfunctorily or arbitrarily'; and, in order for a Court to make a critical evaluation of the agency's action and to determine whether it acted 'perfunctorily or arbitrarily', the agency must . . . 'explicate fully its course of inquiry, its analysis and its reasoning'." 477 F2d at 507.

While the court may not substitute its judgment for that of the agency, the grounds upon which the agency acted must be clearly disclosed in, and substantiated by, the record. *Citizens to Preserve Overton Park* v. *Volpe*, 401 US 402, 416 (1971); *FTC* v. *Sperry and Hutchinson*, 405 US 233, 249 (1972); *duPont* v. *Train*, No. 74-1261, et al (4th Cir. 1976). In evaluating the course of conduct employed by the EPA, we must, of course, bear in mind that Congress vested that agency with the power to choose among alternative strategies. *South Terminal Corp.* v. *EPA*, 504 F2d 646, 655 (1st Cir. 1974). Nevertheless, because of the "drastic impact" of the statute, see *Appalachian Power Co.*, p. 503, and the anticipatory review provisions of § 509(b)(1) of the Act which require review of the EPA's

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[13] 5 USC § 706(2)(A).

regulations under §§ 301, 302 and 306 within 90 days of their issuance rather than at the time of application to a particular point source, EPA must ordinarily be held to a standard of at least literal compliance with the provisions of the Act.

THE REGULATIONS

Under the final regulations promulgated by EPA, all existing generating plants of 500 megawatts or more which came on line on or after January 1, 1970 must backfit closed-cycle cooling systems by July 1, 1981. All existing units, regardless of size, that began or will begin operation on or after January 1, 1974, are likewise subject to the backfit requirements. Limited exemptions are provided, however, based upon land availability, salt drift impact, and interference with commercial aviation.[14] Finally, all new plants are made subject to narrowly limited no-discharge thermal limitations without exception.[15] The regulations also approve of the use of existing cooling lakes by existing but not new generating units.[16] Cooling ponds but not lakes are deemed acceptable for all units. By definition, cooling water impoundments which impede the flow of a navigable stream are cooling lakes while those which do not are cooling ponds.[17]

There are presently three basic methods of closed-cycle cooling systems which may be employed to meet the requirements set forth in EPA's regulations. These are: (a) evaporative cooling systems such as wet cooling towers and spray systems; (b) cooling ponds and lakes; and (c) dry

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[14] 40 CFR §§ 423.11(d), 423.13(1), (m), as amended by 40 Fed. Reg. 7095-96 (1975).

[15] 40 CFR §§ 423.15(1), 423.25(1).

[16] 40 CFR § 423.13(1)(3), § 423.15(1)(2), as amended by 40 Fed. Reg. 7095.

[17] 40 CFR § 423.11(m), (n).

cooling towers. EPA itself has indicated, however, that this latter method of cooling, which employs huge radiator-like devices, cannot generally be applied to large electrical generating units due to the significant loss of plant efficiency which results.[18]

The most commonly used form of evaporative cooling is the wet cooling tower, either natural or mechanical draft. Natural draft cooling towers are enormous concrete cylinders, which may be 350 to 550 feet in diameter and 300 to 600 feet tall. [19] The bottom one-tenth of the tower is filled with slats and baffles to break up the water and expose a larger surface area to the air flow so as to increase evaporation. Warm water from the condenser is pumped to the top of the tower, there discharged, and cooled by moving air as it falls to the bottom. It is there collected and returned to the condenser.

Mechanical draft evaporative cooling towers are composed of modules (each a miniature tower) approximately 70 by 40 feet, placed side by side for distances up to 600 feet. Large top or side mounted fans on each cell provide the air movement for a forced draft to aid evaporation as the warm water drops to the bottom of the tower.

Spray ponds are also used for cooling. They consist of artificial ponds or canals into which water is sprayed. The water is cooled by evaporation resulting from the contact with the natural air currents during the spraying and after collection in the pond.

Cooling ponds and lakes represent the other practical systems. They normally consist of artificially constructed bodies of water built by damning [sic] a natural watershed. The condenser water is fed into the cooling lake or pond

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[18] 39 Fed. Reg. 8296.

[19] The height is necessary to create the natural draft required to draw the air through the tower from bottom to top.

where it is cooled through evaporation. It is then recycled to the condenser.

Regulatory Challenges

(a) *The Act's Regulatory Scheme—Flexibility* v. *Uniformity*

Petitioners argue that the steam electric regulations are excessively rigid in that EPA has prescribed nationally uniform effluent limitations rather than "guidelines for effluent limitations" as required by § 304 of the Act. In essence, they contend that there is no authority under the Act for the issuance of uniform effluent limitations. In large part, this controversy centers around whether the regulations in question were issued under § 301 or § 304. This issue was raised and considered by this court in the case of *duPont* v. *Train,* Nos. 74-1261, et al. (4th Cir. 1976).

In that case, we concluded that the EPA was permitted to establish limitations under § 301 which would be generally applicable to point sources by categories. Slip opinion, p. 12 et seq. We further concluded that the agency could validly impose limitations in terms of single numbers rather than a range of numbers. Slip opinion, p. 16. We went on to state, however, that "[f]or all sources, both existing and new, we believe that the solution which most nearly satisfies congressional intent is recognition that the regulations are presumptively applicable to permit applications." Slip opinion, p. 18. Thus, the issuer of a permit under § 402 may consider whether a particular applicant is to be held strictly to the confines of the agency's regulations. The burden of proof remains upon the applicant, however. Only after he has established the inappropriateness of the regulations as applied to him, for example, employing the generic factors of §§ 304, 306 or any specific variance clauses promulgated thereunder, need the permit issuer go beyond the regulations. Of course, the permit

issuer does not have unreviewable discretion in determining whether limitations prescribed under a particular regulation should be deemed inapplicable to any individual point source. Under § 402(d)(2), EPA may prevent the issuance of any permit to which it objects. Thus, through the exercise of this veto power, the agency may insure that the permit grantors give proper recognition to the need for uniformity in the application of the Act while at the same time recognizing variables which may exist from location to location and plant to plant.

Because we are of opinion that the regulations are only presumptively applicable, we think they are not so rigid as to compel an inflexible application of the Act. Accordingly, we reject this portion of Industry's argument.

(b) *The Variance Clause*

The petitioners have also pressed a number of complaints about the adequacy of the variance clause in the steam electric regulations.[20] That provision allows for modification of the 1977 effluent limitations applicable to a particular point source upon a showing that factors relating to that point source are fundamentally different from those considered in the establishment of the applicable single number limitation. Specifically, Industry contends that: (1) the variance clause is too narrow because it is activated only by "fundamentally different factors"; (2) it should apply to 1983 and new source performance standards; and (3) it should include consideration of economic impact.

As we noted in *duPont,* Nos. 74-1261, et al, provisions for variances are appropriate to the regulatory process. This is particularly so in the case of regulations having presumptive applicability throughout the nation. The factors to be taken into consideration, however, ought ordinarily to be at least as broad as the factors relied upon in estab-

[20] 40 CFR § 423.12(a).

lishing the limitation if the provision is to have meaning. In the instant case, EPA has said that a variance from the 1977 standards will be granted only where "the factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from those factors considered in establishing the guidelines." Thus, only technical and engineering factors, exclusive of cost, may be considered in granting or denying a variance.[21] Based upon the Act taken as a whole, we are of opinion that such a variance clause is unduly restrictive and, accordingly, 40 CFR § 423.12(a), must be set aside and remanded for further consideration.[21a]

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[21] 39 Fed. Reg. 28926-27, 30073 (1974), interpreting 40 CFR § 423.12(a). The interpretations of the variance regulations were on August 2 and 13, 1974, while the steam generating regulations were filed October 7, 1974. The variance provisions construed at 39 Fed. Reg. 28926-7 and 30073 (1974) and those here construed are in the same language.

[21a] In setting aside these regulations, the court perceives no inconsistency with the action taken in *duPont* v. *Train*, No. 74-1261 (4th Cir. 1975). In that case, we refused to review the variance provisions involved there on the grounds that their administration in practice was a matter of speculation. *Slip Op.* at 20. In the instant case, however, EPA, in the administration of these provisions, has recited that the agency's position with regard to variance applications is to the effect that "[t]he cost of control is not an element in granting the variance." 39 Fed. Reg. 28926-7 (August 2, 1974). Again, on August 13, 1974, EPA published a memorandum from the Assistant Administrator for Enforcement and General Counsel to all regional administrators which stated in part:

> "We have been asked whether this provision allows issuance of NPDES permits which deviate from the guidelines as a result of economic factors.
>
> "The answer is 'no'. The provision is limited to adjustments based on 'factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger'.
>
> "The reference to 'other such factors' must be read in light of the previous factors listed; the intent here was to include factors of a technical and engineering nature, rather than to broaden the scope of the provision to include economic factors."
>
> • • • • •
>
> "Thus the law compels a reading of the effluent guidelines to exclude economic factors from the provision for individual adjustment of effluent limitations."
>
> 39 Fed.Reg. 30073.

Thus, it would appear that, unlike the case in *duPont*, the administration of these regulations is not a matter of speculation. As such, they are properly the subject of review at this time.

We begin with the observation that § 301(c) of the Act provides that EPA may grant a variance from the 1983 standards to any point source upon a showing that "such modified requirements (1) will represent the maximum use of technology within the economic capacity of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Clearly, the Act, in its regulatory plan, contemplates increasingly stringent control measures for existing and new sources culminating in the elimination of the discharge of all pollutants into navigable waters by 1985. We are of opinion that the initial phase of these regulations, the 1977 standards and the subsequent new source limitations, were not intended to be applied any less flexibly than the final Phase II—1983 requirements. Thus if such factors as the economic capacity of the owner or operator of a particular point source is relevant in determining whether a variance from the 1983 standards should be permitted, they should be equally relevant when applied to the less stringent 1977 standards as well as the new source requirements.

In addition, we note that both § 304 (1977) and § 306 (new sources) provide that the factors to be taken into consideration in determining the 1977 and new source standards include not only the engineering aspects of the various types of control technology, but also (1) the total

cost of application of such technology (cost of achieving such effluent reduction) and (2) the resulting non-water quality environmental impact (including energy requirements). The EPA has offered no reasoned explanation for limiting the variance clause to considerations of technical and engineering factors only. Certainly the adverse non-water quality environmental impact which may result from the strict application of the agency's effluent limitations to a particular plant is as significant as the technological difficulties which may be encountered. The same may be said for a consideration of energy requirements.

Upon reconsideration, then, EPA should come forward with a meaningful variance clause applicable to existing as well as new sources, taking into consideration at least statutory factors set out in §§ 301(c), 304(b)(1)(B) and 306(b)(1)(B).[22]

(c) *Section 315 Report*

Industry next argues that § 301(b)(2)(A) precludes a no-discharge limitation as a 1983 standard absent achievability findings based upon available information including that developed pursuant to § 315(a). This later provision creates a National Study Commission to review and report on "all of the technological aspects of achieving, and all aspects of the total economic, social, and environmental effects of achieving or not achieving the effluent limitations and goals . . . for 1983. . . ."[23] Since this report was not

[22] In requiring that EPA give weight to the relevant statutory factors in developing a subsequent variance provision, we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage. As we indicated in *duPont*, Nos. 75-1261, et al, an overall cost-benefit analysis for each category or subcategory satisfies the mandate of § 304 in this regard. The variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved.

[23] 33 USC § 1325(a). Apparently (so far as we are now advised)

published at the time of the promulgation of the regulations, it is Industry's position that EPA has improperly promulgated the thermal limitations in question.

The legislative history of § 315 indicates, however, that Congress did not intend that the Commission report be a condition precedent to the establishment of the 1983 standards. It appears, rather, that the report was intended to provide an independent evaluation of the economic, social, and environmental aspects of the regulatory plan to be obviously used in Congressional review of the agency's functions. A part of the explanation of Senator Muskie filed with his filing of the Conference Report of the joint House-Senate conference concerning the Act is directly in point:

> "The House amendment provided a study by the National Academy of Sciences of social, economic and environmental implications of 'best available demonstrated technology' and of any effluent limits which would require the 'elimination of the discharge of pollutants'. Under the House amendment, such a study would have been completed in two years and would have been a condition precedent to any requirements beyond January 1, 1976.
>
> "The Conference agreement does not require a subsequent action of Congress to trigger those aspects of the program which are commonly referred to as Phase II and beyond. The requirement to achieve effluent limitations based on the best available technology and the elimination of discharge of pollutants are automatic on enactment."[24]

a report of the Commission was voted on March 2, 1976. See BNA Environmental Reporter, March 5, 1976, for comment, p. 1865-66, and text, p. 1890-91.

[24] 1 Leg. His. 174-75.

These remarks are supported by the joint Explanatory Remarks by Conference Committee which indicates that the House version of § 315 conditioning implementation of Phase II standards upon receipt of the Commission report was rejected.[25] We are accordingly of opinion that EPA properly promulgated no-discharge limitations under § 301 (b)(2)(A) prior to the submission of the § 315 report.

(d) *Thermal Backfit Requirements*

(1) *1983 Requirements—Reduction for Existing Units*

Industry contends that EPA's 1983 thermal backfit requirements for existing units are invalid because the agency failed to balance the overall social benefits to be derived from its regulations against their social costs. In essence, these regulations, which purport to establish effluent reduction levels attainable by the application of the best available technology economically achievable, require all existing generating units placed in service after December 31, 1973, as well as all units of 500 megawatts or greater coming on line after December 31, 1969, to backfit closed cycle cooling.[26] Petitioners argue that the 1983 effluent limitation standards set forth in the Act[27] reflect an intent on the part of Congress that social benefits of pollution control be measured against their costs in choosing among alternative strategies.

EPA, on the other hand, takes the position that the language of the Act pertaining to the 1983 standards requires

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[25] 1 Leg. His. 319.

[26] 40 CFR §§ 423.11(d), 423.13(l),(m), *as amended by* 40 Fed. Reg. 7095-96 (1975).

[27] 33 USC § 1311(b)(2)(A) provides in part:

"Not later than July 1, 1983, effluent limitations . . . shall require application of the best available technology economically achievable . . . which shall result in reasonabe further progress toward the national goal of eliminating the discharge of all pollutants. . . ."

no balancing of social benefits against social costs. Moreover, the agency asserts that even if the Act were held to so require, it has, in its rulemaking, analyzed the benefits of the challenged regulations and found them to be worth the associated costs. It further asserts that it agrees with its environmental contractor, Energy Resources Company (ERCO), when it states that "benefits cannot be properly assessed within the present state of the Art." We disagree with EPA's (and partially with Industry's) assertions, and, accordingly, set aside and remand for further consideration §§ 432.13(1)(m).

In *duPont,* Nos. 74-1261, et al, we rejected Industry's contention that benefits derived from a particular level of effluent reduction must be quantified in monetary terms, and such contention is rejected here. This reflects the simple fact that such benefits often cannot be reduced to dollars and cents. Nevertheless, EPA is under a statutory duty to determine whether, in fact, its regulations for 1983 will "result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants. . . ." 33 USC § 1311(b)(2)(A). Accordingy, the agency must consider the benefits derived from the application of its effluent reduction requirements in relation to the associated costs in order to determine whether, in fact, the resulting progress is "economically achievable," and whether the progress is "reasonable."

EPA argues, however, that it has, in fact, assessed the benefits to be derived from its regulations and has therefore satisfied the requirements of 33 USC § 1311(b)(2)(A). In support of this contention, EPA refers to the table below.[28] According to that table, EPA calculated the incre-

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[28] This table appears in both EPA's preliminary and final development documents and was available to Industry during the comment period allowed on the proposed regulations.

INCREMENTAL COST OF APPLICATION TO MECHANICAL DRAFT EVAPORATIVE COOLING TOWERS TO NONDEW UNITS (BASIS 1970 DOLLARS)

Type Unit	Remaining Life Years	Incremental Production Costs		Incremental Capital Costs		Additional Fuel Consumption		Generation Capacity Reduction	
		% of Base Cost	Cost/Benefit $/[MWH]$_T$ x10	% of Base Cost	Cost/Benefit $/[MWH]$_T$ x10	% of Base Fuel Consumption	Cost/Benefit $[MHW]_F/[MHW]_T$ x100	% of Base Generating Capac.	Cost/Benefit $MW/[MWH]_T$ x10^7
I. Nuclear	30-36	13	4	12	1	2	3	3	1
(All base-load)	24-30	14	5	12	1	2	3	3	1
	18-24	15	5	12	2	2	3	3	1
	12-18	16	6	12	2	2	3	3	2
	6-12	19	7	12	5	2	3	3	3
	0-6	30	11	12	10	2	3	3	9
Average excl. 0-6		15	5	12	2	2	3	3	1.6
II. Fossil-Fuel									
A. Base-Load	30-36	11	4	12	1	2	3	4	1
	24-30	12	4	12	1	2	3	4	1
	18-24	13	4	12	1	2	3	4	1
	12-18	14	5	12	2	2	3	4	2
	6-12	16	5	12	3	2	3	4	3
	0-6	22	7	12	8	2	3	4	9
Average excl. 0-6		13	4	12	1.6	2	3	4	1.6
B. Cyclic	30-36	14	5	14	2	2	3	4	1
	24-30	15	5	14	2	2	3	4	1
	18-24	16	6	14	2	2	3	4	2
	12-18	18	6	14	3	2	3	4	3
	6-12	20	8	14	5	2	3	4	5
	0-6	30	10	14	15	2	3	4	14
Average excl. 0-6		17	6	14	3	2	3	4	4
C. Peaking	30-36	40	20	16	7	2	3	4	6
	24-30	40	20	16	8	2	3	4	7
	18-24	45	20	16	10	2	3	4	9
	12-18	50	30	16	13	2	3	4	17
	6-12	60	30	16	21	2	3	4	11
	0-6	100	60	16	61	2	3	4	54
Average excl. 0-6		47	24	16	10	2	3	4	11

18a

19a

Assumptions: Type Unit	Base Prod. Cost mills/kwh	Base Cap. Cost $/kw	Annual Boiler Capacity Factor	Heat Rate Btu/kwh	Heat Loss Btu/kwh	Heat Converted Btu/kwh	Heat to Cooling Water Btu/kwh	Cost Replacement Capac. $/kw
I. Nuclear	6.50	150	0.70	10,500	200	3,500	6,800	90
II. Fossil-Fuel								
A. Base-Load	6.34	120	0.77	10,500	500	3,500	6,500	90
B. Cyclic	8.35	120	0.44	11,500	500	3,500	7,500	90
C. Peaking	12.5	120	0.09	12,500	500	3,500	8,500	90

Subscripts: F indicates electrical equivalence of fuel consumed, and T indicates electrical equivalence of heat rejected to cooling water. Both are calculated at 0.293 x 10^{-6} [MWH]/Btu.

mental production costs, capital costs, fuel consumption and capacity reduction which would result from the application of closed-cycle cooling at existing plants of various ages. These incremental values were then compared to the amount of heat kept out of the water by such systems. Based upon the resulting cost-effectiveness ratios, EPA concluded that the thermal control technology there analyzed resulted in more favorable effluent reduction benefits when applied to newer and larger generating units. The analysis also indicated the cost per unit of electricity which accrued as a result of applying closed-cycle cooling to the various generating units. Based upon this study, EPA contends it limited coverage of its backfit regulations to units having baseloads of 500 megawatts or more and coming on line after 1970. Smaller units put into operation after 1973 were likewise required to adopt closed-cycle cooling systems.[29]

Industry challenges EPA's reliance upon these figures on the ground that they do not indicate whether the regulations will result in reasonable further progress toward the national goal. We agree. EPA's study merely establishes the cost-effectiveness of installing mechanical draft cooling towers at individual plant sites. It in no way indicates whether, in light of the associated costs, application of such systems will result in reasonable effluent reduction levels.

In response to this, EPA cites the report of its environmental contractor, ERCO, which it claims satisfactorily analyzes the environmental benefits and risks associated with the various alternatives which were before it. The foundation of this report was apparently a random sample taken of various power companies throughout the country. Based upon this sample, the report concludes that if a generating unit uses less than 30% of a stream's flow, there

[29] 40 CFR § 423.11(d).

will be no ecological danger. If as much as 70% of the stream flow is used more than five percent of the time, however, there will be a high risk of such danger. Between these two extremes, the report concludes that there is a medium risk of danger. Yet, nowhere in the report does ERCO state upon what basis it reached this conclusion. Moreover, ERCO goes on to assume that § 316(a) exemptions will issue to all low risk, half of the medium risk, and none of the high risk installations. Again, however, the reason why the exemption would apply to the assumed proportion of installations is not stated. Perhaps it is a result of ERCO or EPA site studies; perhaps not. We are left to guess. By the same token, we note that the low risk category, for example, does not take into consideration the effect of increases in the temperature of the water discharged into the river by the individual generating units. Is this an oversight or do the results of site by site studies justify the exclusion of the very element, temperature, with which the statute is concerned? Again, the record contains no answer. Simply stated, then, the ERCO report upon which EPA now seeks to rely fails to explain and document the basis for the numerous assumptions made and relied upon in its analysis. As such, we cannot say, based upon this report, whether, in fact, EPA's effluent reduction regulations will result in reasonable further progress toward the elimination of artificial sources of heat from the nation's waters.

Moreover, we further note, finding it to be of some significance, that the record is replete with allusions to the effect of heat upon aquatic life; damage to eggs; different effects on adult and juveniles; the growth of algae; interrupted migration; the thresholds of aquatic communities; differences between streams, lakes and estuaries; are to mention but a few. Yet, despite agreement that the literature is full of learned papers on the subject at hand, EPA contends that the state of the art is not such that the incremental benefits of heat removal from the discharge of

generating plants can be predicted. The references throughout the record to the effects of heat on aquatic life, not unreasonably, cause us to consider this position with a certain degree of caution. The references are simply too numerous and are stated by too many people on both sides who are ostensibly qualified to speak. An illustration is a colloquy between Dr. Brooks of the United Water Act Group and Dr. Schneider of EPA:

> "DR. BROOKS: I would like then, as part of what could have been an answer to that question—I heard earlier that there were numerous shortcomings in existing data available from operating thermal discharges. I think most of us will agree that it is certainly pointed out in the 104 T studies that these deficiencies do exist.
>
> Does EPA believe that there is sufficient data to arrive at any predictions of thermal benefits or benefits at all?
>
> DR. SCHNEIDER: Is this with respect to specific sites or in general?
>
> DR. BROOKS: Both.
>
> DR. SCHNEIDER: That is a very broad question. We could write text books on the subject."

Assuming that EPA's conclusion is correct, that the state of the art is such that the incremental effects of heat are not known with any degree of certainty, the least EPA could have done would have been to articulate what the state of the art was and why, according to scientific opinion, predictions could not be made. Even assuming that it might not be possible to articulate with reasonable certainty the achievability of the benefits to be derived from a specified amount of heat removal, it seems to us that the expectancy might be stated, for if there is no expectancy of benefits to aquatic life, is the expenditure of billions of dollars justified under any standard?

We, of course, recognize that EPA may fairly assume that a reduction in the amount of heat discharged will, as a general rule, result in some benefit to the environment. The question is, however, whether the reduction results in reasonable further progress toward the elimination of pollutants. This is ultimately a matter within the sound discretion of EPA itself. Yet, in determining whether a particular reduction level is, in fact, reasonable, EPA must compare the cost of achieving that level of reductions (which it has done) and the ecological benefits to be derived therefrom (which it has not done) with the benefits and costs associated with alternative levels of heat reduction.

At the very least, on the best information available, the ecological benefits expected from the ordered reduction should be stated, and, if impossible so to do, EPA should state why. It may well be, for example, that a 90% reduction in thermal pollution at a cost of $5 billion is entirely reasonable even when it is shown that an 80% reduction would cost but $2 billion, for it is possible that the elimination of the additional 10% in total heat discharged would have positive environmental effects which would far outweigh the additional $3 billion in cost. By the same token, if no tangible environmental benefits will accrue by increasing the thermal reduction level from 80% to 90%, the additional expenditure of $3 billion might be considered unjustified. Thus, in choosing among alternative strategies, EPA must not only set forth the cost of achieving a particular level of heat reduction but must also state the expected environmental benefits, that is to say the effect on the environment, which will take place as a result of reduction,[30]

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[30] By tangible environmental benefits, we mean something more than BTU's of heat rejected. Certainly, to exaggerate to make the point, it could not seriously be contended that a reviewing court could say that an overall reduction of, say, 10 BTU's of heat discharged into the nation's rivers at a cost of $5 billion represents a reasonable reduction level. So we see that it is only when the re-

for it is only after EPA has fully explicated its course of conduct in this manner that a reviewing court can determine whether the agency has, in light of the goal to be achieved, acted arbitrarily or capriciously in adopting a particular effluent reduction level. Were this not the case, EPA would be free to impose ever more stringent and costly control measures which, while incrementally reducing the level of thermal discharge, would not result in any reasonable improvement in the "chemical, physical, and biological integrity of the Nation's waters." 33 USC § 1251.

It should be made clear, however, that our remand here is very narrow in scope since we do not disapprove the general principle of requiring installation of cooling devices on a part of the planned and existing electrical generators in the country. EPA's conclusion that the size of the generator and the year of its first service operation offers the best means of determining which units will be required to backfit seems to us to be reasonable and subject to no infirmity now apparent calling for reconsideration. Moreover, we are not now prepared to say the particular sizes of generators and dates of service which EPA has adopted as the breaking points for ascertaining the necessity of backfitting cooling devices on existing or planned equipment are unreasonable on the record before us.

Yet, while we are unable to say that EPA has note acted reasonably, neither are we able to say it has not acted "perfunctorily or arbitrarily," *Appalachian Power* v. *EPA*, supra, p. 507, for the "criteria used in reaching . . . [the]

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duction level and the asociated costs are compared with the environmental benefits to be expected that a critical evaluation of EPA's actions can be made. In this respect, § 304(b)(1)(B), for example, requires "consideration of the total cost of application of technology in relation to the effluent reduction benefits" for 1977 standards. Had Congress intended merely to require a standard of the percentage of heat removal, it would have provided for a simple equation and the drafters would have done so.

result" has not been stated other than by way of assumptions rather than by the reasoning of those qualified in the field. As was the case in *Tanner's Council of America* v. *Train*, No. 74-1740 (4th Cir. 3/10/76), there is simply no evidence in the record that would reveal the reasonableness of EPA's conclusions. To sustain these regulations on the present record, this court would have to trust completely EPA's conclusions. Judicial review must be based on something more than trust and faith in EPA's expertise, however. *duPont* v. *Train*, Nos. 74-1261, et al (4th Cir. 3/10/76), at p. 45.

On remand, then, EPA must state the benefits especially to aquatic life, for the various alternatives considered if that can be done. If these benefits cannot be stated with any degree of certainty, EPA will state the expected benefits according to whatever scientific opinion it relies upon, fully explicating the basis, including the opinion, upon which it relies. If no expected benefits can be stated, EPA must state why they cannot be and the scientific opinion which supports that conclusion.

(2) *Economic Achievability of EPA's Thermal Backfit Requirements*

Industry also attacks EPA's backfit requirements on the grounds that they will impose a staggering burden on the power industry.[31] According to EPA, its thermal controls

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[31] Industry, in its brief, contends that it "will be hard pressed, if it is able at all, to finance its future public obligations." While we are sympathetic to the plight of the electric utilities, the mere fact that these regulations will bring added pressure to bear is not a sufficient basis upon which this court may conclude that EPA has acted arbitrarily. Only if Industry establishes that EPA's conclusions as to the economic achievability of these backfit requirements are erroneous under the standards of review to be applied in such cases may the regulations be set aside. The fact that there may be great cost associated with compliance is a political judgment of Congress and not subject to review except under the very narrow

will require $5.2 billion in additional funding. Industry, on the other hand, estimates the cost at close to $7.4 billion.[32] The agency contends that even if this higher figure is accepted, capital cost to electric utilities will increase by only 7% between now and 1983.

In support of its position that Industry can, in fact, secure the necessary funding to meet the backfit requirements, EPA relies primarily upon an economic analysis of its final effluent standards done by Temple, Baker, and Sloane, Inc. (Temple).[33] Temple's final report, which was submitted in December of 1974, noted that prior to the 1973 Arab Oil embargo, the electric utility industry was planning to spend more than $205 billion for capital equipment. Due to a decline in growth,[34] it found that current estimates of such expenditures should have been revised downward to $179 billion. Temple then took the position that if

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standards associated with constitutional questions and review of administrative decisions.

[32] Industry does not explain in its brief the basis for its higher cost estimate nor does it challenge EPA's method in ariving at its $5.2 billion figure. It also claims at least $6.5 billion additional costs (EPA says $4.3 billion) for construction work in progress and chemical controls and the expense of the Clean Air Act compliance of $13.3 billion.

[33] We note in passing that this report was submitted after the final regulations were issued. It was, however, an up-to-date of an earlier report and Industry raises no issue as to its timeliness. Since the regulations are to be remanded, Industry will be afforded an opportunity to offer any objections which it may have to Temple's assumptions and conclusions.

[34] The growth rate of electricity demand fell from its historic level of 7.2% to 5.5% following the Arab oil boycott. Industry contends that growth is returning to the historic level which may substantially undermine EPA's basic assumptions. On remand, EPA should fully evaluate this contention in developing revised regulations, taking into account the latest economic data and forecasts for the industry as well as the nation.

Industry could have raised the additional $25 billion required to finance its original growth estimates, it "should experience little trouble meeting the added requirements to comply with the final guidelines."

In addition, EPA suggests that the unique relationship that exists between government and the utilities lessens the degree to which Industry must contend with the vagaries of the marketplace. The agency points out that certain factors governing the industry's future growth such as cash flow, return on capital, and demand growth, are subject to direct manipulation by governmental agencies. EPA further asserts that:

> "[B]ecause the industry plays an important role in determining the actions of state and federal regulatory commissions, to the extent that they themselves promote such innovative practices as peak power pricing to flatten peak demand, they can be a controlling factor in determing their own future capital needs. If the electric utility industry were genuinely doubtful about its ability to meet its future capital needs, it would now be promoting rate structures conducive to a flattening of peak demand curves, and a reduction in the rate of growth, rather than the type of rate structure currently in widespread use, which encourages greater consumption and the wasting of energy." EPA Br. at 66.

Industry disputes both of these assertions. First, it contends that rate regulation is often, in practice, a constraint rather than an aid in efforts to compete for scarce capital. Moreover, Industry argues that despite EPA's contentions to the contrary, a reduction in demand brought on by the energy crisis and a general downward turn in the economy does not make available additional capital.

Since the EPA's backfit regulations have been set aside for further consideration, we find it unnecessary to pass on the validity of the agency's economic analysis. Before

any revised regulations are promulgated, however, we direct that EPA fully consider any economic changes which may have occurred in the money market or in the demand projections for the electric utility industry since these regulations were issued, and afford Industry an opportunity to comment upon its analysis.

(e) *Backfit Requirements for AEC Approved Nuclear Power Plants*

Industry next contends that EPA's summary rejection of an Atomic Energy Commission proposal that fifty-five nuclear power units which had completed environmental impact statements be exempted from the backfit requirements was arbitrary and capricious. The National Environmental Policy Act [35] requires every Federal agency to take into account the environmental impact of certain proposed actions. Pursuant to this mandate, the AEC's (now Nuclear Regulatory Commission) licensing process entailed, at every stage of review, an analysis of the economic, social, and environmental costs and benefits of proposed nuclear generating units.[36]

Following its NEPA review, the Commission concluded that there were approximately 70 units for which the environmental impacts of thermal effluents were not significant or sufficiently serious to warrant the cost of closed-cycle cooling. Fifteen of these units were found not to come under EPA's backfit requirements due to either age or size. The remaining fifty-five units would, however, have been required to install closed-cycle systems unless exempted. Accordingly, Dr. Dixy Lee Ray, Chairman of the AEC, wrote EPA requesting:

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[35] 42 USC § 4321 et seq.

[36] Since 1971, the AEC-NEPA review process has been governed by Appendix D to 10 CFR, Part 50. This was reinstated on July 18, 1974, in 10 CFR, Part 51. 39 Fed. Reg. 26279.

> "[A] special class in the steam-electric power plant category of point sources be established under section 304(b)(1) and 304(b)(2) of the FWPCA. As contemplated by the statute, the class would consist of steam-electric power plants of a certain type (nuclear power reactors) and age (those for which final environmental impact statements had been prepared by the AEC Regulatory Staff pursuant to section 102(2)(C) of NEPA prior to the effective date of the guidelines)."

In support of this request, Dr. Ray pointed out that the capital expenditures required to backfit closed-cycle cooling systems at these plants would approximate $2.1 billion in 1974 dollars. Escalation would increase that figure by 50% by the year 1983.

In response, Russell E. Train, Administrator of EPA, noted that a similar proposal was considered in preparing the preliminary guidelines but was rejected because "in the opinion of [EPA's] General Counsel, it would not be legally defensible." This is the only apparent explanation for EPA's action. The preamble to EPA's regulations does not discuss the question nor does EPA's Development Document or Economic Analysis.

Certainly, the bold assertion that AEC's proposal is "not legally defensible" is not a sufficient articulation of the criteria employed by EPA in reaching its decision. It does not permit the court to in any way satisfy itself that the agency engaged in reasoned decision-making. See, e.g., *Appalachian Power Co.* v. *EPA*, 477 F2d 495, 507 (4th Cir. 1973). Accordingly, EPA is directed upon reconsideration of its backfit regulations to fully evaluate the AEC's proposal and set forth its reasons for rejecting or accepting the proposed category in its revised regulations.[37]

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[37] EPA contends that an order that it reconsider the AEC's

In so directing, we do not imply that EPA must abdicate its authority over effluent reduction to the AEC or NRC. As the parties themselves point out, such abdication of authority has been repeatedly held invalid. See *Calvert Cliffs Coordinating Committee* v. *AEC*, 449 F2d 1109 (D.C. Cir. 1971); *Greene Co. Planning Bd.* v. *FPC*, 455 F2d 412 (2d Cir. 1972). We do require, however, that EPA "explicate fully its course of inquiry." *Appalachian*, supra, at 507.

(f) *Cooling Lakes as Best Available Technology*

Under 40 CFR § 423.15(1) and 40 CFR § 423.25(1), the discharge of heat by steam-elctric power plants classified as new sources is permitted only in "blowdown from recirculated cooling water systems," (e.g. cooling towers) and in "blowdown from cooling ponds." Existing units under 40 CFR § 423.13(1), on the other hand, are permitted to employ a variety of cooling techniques, including existing cooling lakes. Industry, as well as the State of Texas, contends that EPA's restrictions upon the use of existing and new cooling lakes is both arbitrary and capricious in light of the resulting increase in water consumption.[38]

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proposal would, at this time, be an empty gesture since EPA and the Commission have declared themselves to be in substantial agreement as to the fifty-five units in question. Despite the fact that a tentative EPA-NRC agreement may have been reached that none of these plants need backfit, we were informed by counsel for EPA at oral argument that no permits have yet been issued to these plants. Moreover, even if the permits had been issued, Industry is compelled by the anticipatory review procedures of § 509 of the Act to challenge the agency's failure to provide for a subcategory of nuclear power plants now or forego all review. Thus, we do not agree that the issue is moot.

[38] In addition to the industry petitioners and the State of Texas, the Brazos River Authority also joins in challenging this portion of the regulations. The Authority is an organization created under the laws of Texas and is charged with conserving the waters of the

EPA has defined "cooling lakes" as any "manmade water impoundment which impedes the flow of a navigable stream and which is used to remove waste heat from heated condenser water prior to recirculating the water to the main condenser." 40 CFR § 423.11(n). Cooling ponds, by way of contrast, include "any manmade water impoundment which does not impede the flow of a navigable stream and which is used to remove waste heat from condenser water. . . ." 40 CFR § 423.11(m).

This distinction takes on meaning when considered in light of EPA's interpretation of the term "navigable waters." According to the agency, all "[i]ntrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational and other purposes; intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce; and intrastate lakes, rivers and streams which are utilized for industrial purposes by industries for interstate commerce"[39] are navigable waters. At oral argument, counsel for EPA took the position that this includes not only the waters of natural streams, lakes and rivers, but also surface waters which diffuse themselves over the ground and follow no defined course or channel, gathering into no more definite body of water than a wet weather creek. We reject this assertion, being of opinion that, where possible, the collection and use of such surface waters as opposed to natural rivers, lakes and streams furthers the purpose of the Act in restoring and maintaining the "chemical, physical and biological integrity of the Nation's waters."[40]

Brazos River. It owns and operates two major reservoirs and has a third under construction. In addition, it owns the conservation storage is six federal reservoirs along the tributaries of the Brazos.

[39] 40 CFR § 125.1(p).

[40] 33 USC § 1251(a).

We nevertheless recognize that virtually every natural stream falls within this narrower view as to what constitutes "navigable waters." According to EPA's regulations, any impoundment which impedes the natural flow of any such stream would constitute a cooling lake and thus preclude it from use for cooling purposes.

Despite EPA's restrictions upon the use of cooling lakes, the agency's own Development Document specifically identifies such lakes as a form of closed-cycle cooling. It states:

> "The technological basis for best available technology economically achievable, and new source performance standards consist of closed-cycle evaporative cooling towers and cooling ponds, lakes and canals." [41]

Moreover, that document lists cooling lakes as one of the available technologies for achieving waste heat removal in closed or recirculated cooling systems.[42] As is there noted, such lakes "are similar in principle to open, once-through systems, but . . . are closed inasmuch as no significant thermal discharge occurs beyond the confines of the lake." [43]

So we see that EPA has itself recognized that cooling lakes represent an achievable method of closed-cycle cooling. In addition, the agency has deemed them to be the best practicable technology for existing generating units presently employing such lakes.

Despite the foregoing, EPA attempts to justify its limitations on the use of cooling lakes on the ground that it is obliged under the Act to ban all new discharges into existing or new lakes becaues they are navigable waters. We disagree. The Act contains no blanket requirement that all effluent discharges into navigable waters be eliminated. Rather, § 306(b)(1)(B) of the Act merely requires that EPA propose and public regulations establishing "standards of performance" for "new sources" within a list of "categories" of point sources, giving due regard at least to non-water quality environmental impact and energy requirements. The term "standard of performance" is defined as "a standard for the control of discharges of pollutants which reflects the greater degree of effluent reduction . . . including, where practicable, a standard permitting no discharge of pollutants." [44] Thus, where no discharge limitations are not practicable in light of the non-water quality impact or other such factors, the "best available" technology may, in fact, entail some discharge of heat into the Nation's waters.[45]

The EPA has itself recognized this in the case of existing generating units employing cooling lakes. Due to the fact that "the addition of recirculating systems to [existing] lakes would substantially increase water consumption," [46] the agency concluded that cooling lakes were

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[41] Development Document at 2.

[42] Development Document at 496.

[43] *Id.*

[44] 33 USC § 1316(a)(1).

[45] We similarly reject EPA's assertion that before any new discharge of heat may be permitted, there must be a showing under § 316(a) that such discharges will not endanger a balanced indigenous population of shellfish, fish and wildlife in and on the body of water. As Congressman Wright, a member of the Conference Committee considering the Act, stated in a letter to the Administrator:

> "Congress did not intend, with § 316(a) to relieve EPA of the duty of establishing categories of point sources of thermal discharges and evaluating in each category the effects of factors such as the cost of achieving effluent reductions and non-water quality impacts including energy requirements and water consumption."

We are of opinion that sole reliance upon § 316(a) in assessing whether new discharges would be appropriate would effectively preempt consideration of the statutory factors set forth in §§ 304(b)(2) and 306 for "best available" technology.

[46] Respondent's Brief at 77.

the best practicable technology. Industry contends that this same reasoning holds true for new units on existing lakes as well as units on newly constructed lakes. We agree.

EPA's § 104(t) report supports Industry's assertion that the use of cooling towers will result in a dramatic increase in water consumption. It concludes that "the evaporation resulting from a given thermal addition to a [cooling] lake is generally less than 50% of the evaporation that will result from similar thermal loading of a cooling tower."[47] In California alone, the use of cooling towers rather than lakes at all additional power plants projected to be on line by 1990 will create an annual water deficiency of nearly 2.2 million acre-feet;[48] more than double the 1970 prediction. In the Brazos River Basin of Texas, the consumptive use of water for cooling purposes resulting from the installation of cooling towers would increase by one and one-half to two times, according to some estimates. An unanswered argument at this stage of the proceeding is Governor Briscoe's (of Texas) letter to EPA: "The level of consumptive use of water that would be necessitated by implementing these proposed regulations is not merely unacceptable; Texas sim-

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[47] EPA defends its prohibition of new lakes on the ground that cooling towers, in fact, evaporate less water than cooling lakes. While this may be true in terms of total evaporation considering cooling use only, not all water loss can be attributed to the cooling function since such lakes are multipurpose in nature. They may be designed, for example, so as to augment low stream flows for the ultimate benefit of other water users, and also provide flood control. Also, they may be constructed so as to meet the water needs of communities as well as provide an opportunity for water recreation. Thus, we reject EPA's attempt to use isolated water consumption comparisons to support its blanket requirements.

[48] Three acre-feet of water equal one million gallons.

ply does not have the water resources available to comply."[49]

EPA dismissed these concerns during the rulemaking process, however, on the ground that "much of the evaporated water would precipitate [again] through the natural water cycle."[50] This is obviously not a sufficient answer and demonstrates a serious lack of concern for a balanced consideration of the total environmental impact of the regulations. In Arizona and New Mexico, for example, almost all precipitation is from tropical storms which originate in the Caribbean or Mid-Pacific, while in California almost all precipitation originates in the North Pacific. Little, if any, of the water which evaporates in these States returns in the form of rain. Thus, any new use of water in these areas results in a net reduction in the water supply remaining available for other uses.[51]

It is clear that Congress intended such reductions in water supply to be taken into consideration by EPA in

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[49] Reflecting this concern over what constitutes the "best available technology" for water short areas, the General Counsel for the Department of Commerce, in a letter to EPA concluded that:

> "Subcategorization of the industry by locality taking into account the availability of water for consumptive use, should have been considered during formulation of the proposed guidelines."

Similarly, the Federal Power Commission recommended that the "best" technology in water deficient areas should reflect that form of cooling which is least water consumptive.

[50] 39 Fed. Reg. 8303.

[51] As the Federal Power Commission pointed out, "[t]his hydrologic system is such that EPA's response . . . appears most flipant [sic]." The FPC argued without avail the reasonable position that EPA analyze meteorological and water resource information so that the public could be assured that the effluent guidelines would cause no significant negative environmental impact in any region of the United States.

determining the best available technology to abate effluent discharges. The basic directive of the entire Act is set forth in § 102(a) of the Act and provides, in part, that EPA must give due regard to "the withdrawal of such waters for public supply, agricultural, industrial and other purposes."[52] In addition, § 104 provides for continuing comprehensive studies of the effects of the control of thermal discharges. In so doing, it requires that EPA "[i]n evaluating alternative methods of control . . . consider . . . the total impact on the environment, considering not only water quality but also air quality, land use, and effective utilization and conservation of fresh water. . . ."[53] This Congressional concern over the conservation of our limited water resources is further reflected in §§ 304 and 306 which require consideration of various enumerated factors including the non-water quality impact of any regulations on the environment in determining what constitutes the "best" technology.

We are of opinion, therefore, that EPA's ban on the use of new and existing cooling lakes is clearly not in accordance with the Congressional directive regarding the conservation of our water resources, probably in most areas of the country, and particularly as that ban applies to regions where refresh water is in short supply. It is evident from an examination of the record that EPA's regulations will result in needless water consumption and, thus, impede effective utilization of our fresh water resources. Accordingly, 40 CFR §§ 423.13(1), 423.15(1), and 423.25(1) are set aside and remanded to EPA for further consideration with directions that it fully evaluate the total environmental impact of any subsequent regulations which it may issue, particularly with reference to water usage and its effect on the more arid regions of the Nation.

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[52] 33 USC § 1252.

[53] 33 USC § 1254(t).

On remand, EPA may find it difficult to avoid the logic of the statement of the General Counsel of the Department of Commerce (*see*, footnote 49, *supra*) where he concludes that subcategorization of the industry by locality should have been considered taking into account the availability of water for consumptive use. It is difficult for us to see how any program could receive approval which did not, at the very least, balance the consumption of water against the water resources and its effect. Along this line, since the use of water is less in most lakes used for cooling and also for other purposes, their exclusion without taking into account water consumption may only be considered arbitrary and capricious. We repeat for emphasis that EPA must consider the almost immeasurable impact of needless increases in water consumption in any part of the country, especially the arid areas.[54]

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[54] We note in pasing that EPA, on March 26, 1976, published proposed new "Effluent Guidelines and Standards" for steam electric generating plants. 41 Fed. Reg. 12694. These regulations were merely proposed and there is no assurance that they will be adopted. However, under them, cooling lakes could be used for cooling purposes to the extent that they qualified as "recirculating cooling water bod[ies]." According to § 423.11(o)(3) of the proposed regulations, "recirculating cooling bod[ies]" are limited to lakes where:

> "[t]he projected long-term average annual total discharge from the impoundment is no greater than 100 cubic feet per second per 100 megawatt generating capacity (nameplate capacity) of the plant."

In response to an inquiry by the court made of all parties as to the effect of these proposed regulations upon the present controversy, the Brazos River Authority asserted that the new regulations did not alleviate the problem facing the more arid regions of the country since the definition of recirculating cooling bodies restricts the construction of new cooling lakes to smaller streams. Counsel for both the State of Texas and the United Water Act Group agreed. EPA did not respond directly to this contention but did agree that it would be appropriate to enter an order of remand as to the remaining cooling lake regulations.

Since EPA has chosen not to rescind the present regulations and

(g) *Sea Water Cooling Towers as Best Available Technology for Open Ocean Dischargers*

EPA's regulations also prohibit open ocean thermal discharges and require closed-cycle cooling at power plants located along the nation's coastlines.[55] Because fresh water towers would exacerbate water shortages in many coastal areas, EPA has recognized that cooling towers in such areas must, of necessity, employ sea water.[56]

Industry first challenges the forced construction of such cooling towers at new coastline plants on the ground that sea water cooling towers for full-sized power plants are not "currently available" and, thus, are not "demonstrated" as is required under § 306. We need not reach this question, however, since 40 CFR § 423.13(1), as amended by 40 Fed. Reg. 7095-96 (1975), has previously been set aside. Upon reconsideration of that portion of its effluent limitation guidelines, EPA should, nevertheless, allow industry the opportunity to comment upon any revised regulations insofar as they relate to sea water cooling towers and reconsider its position if industry's objections have merit. We especially note that the B. L. England Station may well be the only power station presently in existence which approaches the required technology. On remand, particular attention should be paid to data relating to the performance of that station. By emphasizing

since they apparently will not alleviate the problem facing Texas and other such states, this court is of opinion that the issuance of the proposed regulations does not render the present controversy moot. To the extent that EPA has retreated from its earlier position banning the use of all cooling lakes by new point sources, however, the court considers this a concession that its earlier position as to water consumption may have been in error.

[55] 40 CFR § 423.13(1), as amended by 40 Fed. Reg. 7095-96 (1975).

[56] 39 Fed. Reg. 36190 (1974).
[Footnotes 57, 58 and 59 are omitted.]

the B. L. England Station, we do not mean to exclude from consideration on remand other relevant information from legitimate sources.

(h) *EPA's Implementation of § 316(a)*

Section 316(a) of the Act provides that EPA may impose less stringent effluent limitations at any point source than might otherwise be required under either § 301 or § 306 "whenever the owner or operator of any such point source . . . can demonstrate that any effluent limitation proposed for the control of the thermal component . . . will require effluent limitations more stringent than necessary to assure the projection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water. . . ."[61] Petitioners contend that in implementing this section, EPA must provide that a plant's compliance with existing water quality standards constitutes *prima facie* evidence of compliance with the requirements of § 316(a). Accordingly, industry argues that EPA has not properly implemented § 316 and, thus, the applicable regulations must be set aside and remanded for further consideration.[62] We disagree.

Industry cites nothing in the Act or its legislative history which requires EPA to adopt its suggested test under § 316. We, of course, recognize that under the Act each state adopts water quality standards for inter- and intrastate water so as to "protect the public health or welfare, enhance the quality of water and serve the purpose of this chapter."[63] In addition, such standards must take into consideration "[the receiving water's] use, and value for public water supplies, propagation of fish and

[61] 33 USC § 1326(a)

[62] EPA's regulations implementing § 316(a) are at 40 CFR Part 122, especially subparts B and C, 39 Fed. Reg. 36175-84 (1974).

[63] 33 USC § 1313(c)(2).

wildlife, [and] recreational purposes. . . ."[64] Moreover, EPA is required to review all such standards and revise them where they are deemed inadequate.[65] So we do not agree with Industry that the § 316(a) "protection and propagation" standard must be deemed satisfied if the thermal discharge in question meets the applicable water quality standards as distinguished from effluent standards.

EPA points out that state water quality standards typically apply to an entire waterway or a relatively large segment of it. By way of contrast, EPA views § 316(a) as providing for consideration of specific site conditions in the setting of thermal limitations for individual power plants. Thus, while a greater level of thermal effluent by a generating unit might well fall within the general requirements of an approved state standard, EPA takes the position that such discharge might nevertheless cause serious harm to a particular spawning ground, for example, located just below the plant's discharge point. It is such specific site conditions to which EPA contends § 316(a) is directed.

While both the position of Industry and EPA have force in logic, we are of opinion that *Train* v. *NRDC, Inc.*, 421 US 60 (1975), is controlling here. There, the court indicated that while an agency's interpretation of its statutory authorization need not be "the only one it permissibly could have adopted. . . [if] it was at least sufficiently reasonable . . . it should [be] accepted by the reviewing courts." 421 US at 75. Moreover, the court went on to reiterate that where an agency's interpretation of a particular act is not unreasonable, Courts of Appeals ought not substitute their judgment for that of the agency. *Id.*

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[64] 33 USC § 1313(c)(2).

[64] 33 USC § 1313(c)(2).

[65] 33 USC § 1313(c)(3).

at 87. Thus, in the absence of statutory language or legislative history indicating that compliance with state water quality standards should be deemed to satisfy the requirements of § 316(a), we think EPA's position is reasonable. Accordingly, we decline to set aside 40 CFR Part 122 implementing § 316(a) of the Act.

(i) *Rainfall Runoff Regulations*

EPA's regulations also limit suspended solids in rainfall runoff from areas disturbed by construction activity[66] or used for "material storage"[67] to 50 mg/l. Industry challenges these limitations on the grounds that (1) they are impermissibly vague and apply to nonpoint source runoff; (2) EPA did not adequately consider control costs; and (3) the record does not support the 50 mg/l limitation.

(1) *Applicability to Nonpoint Sources*

Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former.[68] Section 502(14) defines a "point source" as:

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[66] 40 CFR §§ 423.42, 423.43, 423.45. "Construction runoff" was originally defined as "the rainfall runoff from any construction activity and any earth surface disturbed by such activity from the inception of the construction until construction is complete and any disturbed earth is returned to a vegetative or other cover commensurate with the intended land use." 40 CFR § 423.41(c). A subsequent amendment inserted the words "point source" before the term "rainfall runoff." 40 Fed. Reg. 7096 *amending* 40 CFR § 423.41(c).

[67] The regulations define "material storage runoff" as "the runoff from or through any coal, ash, or other material storage pile." 40 CFR § 423.41(b).

[68] Sections 301(a), 301(b), and 306 of the Act give EPA authority to regulate point source discharges. Nonpoint sources are subject only to analysis, study, and suggestions, pursuant to § 304(e).

> "[A]ny discernible, confined and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged."[69]

Industry agreed throughout the rulemaking that contaminated runoff discharges from coal storage and chemical handling areas fell within this definition and should be subject to reasonable controls. It does not contest such application of the regulations. Contaminated runoff from these limited areas is, according to Industry, ordinarily collected into a "point source" and can reasonably be treated so as to remove any pollutants.

Industry asserts, however, that EPA's material storage runoff regulations purport to cover not only point sources such as coal storage areas, but also nonpoint sources as well. Rainfall runoff from areas such as those used to store construction material is, according to Industry, not normally routed into a "point source" collection system, and it is Industry's contention that EPA has no authority to compel such collection so as to transform a nonpoint source into a point source. EPA, on the other hand, argues that runoff from material storage sites, where channeled into a settling pond or other such collection system, is clearly subject to regulation. Thus, it takes the position that to exempt uncollected runoff from regulation would be to permit pollution by indirection which would otherwise be barred.

There is some logic in EPA's position, and we do not dismiss it lightly. Yet, Congress has limited the definition of "point source" to "any discernible, confined or discrete conveyance." Broad though this definition may be,

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[69] 33 USC § 1362(14).

we are of opinion that it does not include unchanneled and uncollected surface waters.

Industry also argues that while EPA's construction runoff regulations do purport to limit themselves to "point source" application, they fail to define the discharges to which they apply. This difficulty is allegedly brought about by the regulations' failure to define the area which they cover other than to say they include point source rainfall runoff from "any construction activity and any earth surface disturbed by such activity" related to power plants.

We agree. It is impossible to determine from the regulations whether the construction, for example, of chemical treatment plants, sewage lines, fuel storage and transportation facilities or other such units are subject to control. The only indication as to the breadth of these regulations is found in EPA's Development Document which states:

> "Rainfall runoff waste water sources include material storage drainage and runoff from construction activities. Construction activities include only those in the immediate vicinity of the generating unit(s) and related equipment. Runoff from other parts of the site (land and future generating units, construction of access roads, cooling ponds and lakes, visitor centers, etc.) is not intended to be covered by these limitations."[70]

This limitation upon the applicability of the rainfall runoff controls is, however, not found in EPA's published regulations. While the regulation is limited to point sources, the all-embracing aspect is not supported by the development document, the limits in which cannot be deemed to provide the guidance necessary for either the enforcing authorities who must apply these regulations on a case-by-case basis or the dischargees who must conform their activities accordingly.

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[70] 2 App. 209, 438.

We are of opinion that EPA's rainfall runoff regulations must be set aside and remanded with directions that EPA clarify the scope of their applicability and properly limit any subsequent controls to "point sources" only.

(2) *EPA's Consideration of Costs*

Industry also argues that EPA, in arriving at its limitations, did not adequately consider the cost of controlling ash pile and construction site runoff. It appears from the record that in estimating the costs associated with such control, EPA relied entirely upon data relative to coal pile runoff. The agency concedes this fact but argues that, insofar as the regulations apply to ash piles, the omission of the data is immaterial due to their rarity.

If the agency by regulation controls the runoff from ash piles (however rare) and construction activity (concededly common), it must consider the cost. That is the command of the statute. §§ 304(b)(1)(B); 304(b)(2)(A); 306(b)(1)(B).

EPA's cost analysis is also deficient for another related reason. EPA's new source standards [71] for disposal of fly ash effectively require the abandonment of the method of hydraulic transport of fly ash to ponds for settling by prohibiting any "discharge of TSS or oil or grease in fly ash transport water." The practical effect of this standard on coal-fired generating units, according to Industry, is to require all such plants to utilize dry fly ash transport systems.[72] Such systems produce large amounts of ash which will require storage—over 1000 tons per day at a

[71] 40 CFR § 423.15(e); 40 CFR § 423.25(e).

[72] EPA does not dispute this contention as to the effect of the regulation insofar as it requires dry fly ash transport systems. The agency does assert, however, that such systems have been developed and are in use.

single plant.[73] Given EPA's observation that most new generating units will be either coal or nuclear facilities,[74] it would appear that the costs of the required controls applicable to ash piles will be significant.

Without the use of hydraulic transport for fly ash, it is obvious that the ash pile which EPA now describes as a rarity will become common in the immediate future, especially at coal burning installations. Indeed, it is mandatory that something be done with the ash. And so long as it is an acceptable alternative (as it must be since EPA wishes to control it), the cost of its maintenance and control must be considered.

Industry further contends that, in relation to the construction site runoff limitations, a 3,000 MW plant will require, exclusive of any coal storage area, 100 to 400 acres of land, much of which will be the location of some construction activity. Collecting and treating runoff from such large areas, according to Industry, will cost far more than EPA's coal pile cost estimate. Even if we were to assume that Industry has over-estimated the area affected by the regulations as well as the associated costs,[75] we are nevertheless of the opinion that EPA has failed to offer any data to support its conclusion that the cost of treating construction site runoff is comparable to that required in controlling coal piles.

[73] A 2000 MW plant, for example, produces 400,000 tons of ash per year, approximately 70% of which is dry ash. A comparable 2100 MW plant burning low ash coal produces 1,815 tons of ash per day.

[74] Br. for Respondent at 90.

[75] Industry's 100 to 400 acre estimate includes space for parking lots, drives, and rail, barge or truck terminals, all of which are purportedly excluded from the regulation by the Development Document. See n. 70 supra.

Accordingly, upon reconsideration of its rainfall runoff regulations, EPA is directed to evaluate the associated cost of controlling ash pile and construction site runoff (as well as the maintenance of ash piles which is later discussed) before establishing any new discharge limitations.

(3) *Evidentiary Basis for the 50 mg./1 Limitation*

Finally, Industry takes the position that the record offers no support for EPA's conclusion that the 50 mg./1 limit on suspended solids in rainfall runoff from construction activity or material storage areas (other than coal piles) is attainable by the treatment method identified by the agency as "best available." We agree. As has been noted, EPA did not evaluate any "controlled area" relative to construction site or ash pile runoff. While there is data in the record concerning control techniques for coal pile runoff, there is no indication that such technology is feasible in the context of construction site or ash pile runoff.

EPA states "[t]he rainfall runoff limitation was derived from runoff studies done for the Agency" citing a March 1975 study at a Pennsylvania strip mine. Although the study shows a 92.8% efficiency in removal of solids, it is not available support for the regulations because it was made after the regulations were promulgated. *Tanners Council,* Nos. 74-1740, et al (4th Cir. 3/10/76), p. 4. Industry additionally argues that even with 92.8% efficiency, if the runoff level of 10,000 mg./1 TSS were encountered as was demonstrated at a Washington mine, the TSS discharged would be 720 mg./1, or more than 14 times the acceptable level of the regulations. EPA, of course, had no opportunity to rely to this argument, yet enough has been shown to require a remand for reconsideration of the whole problem. We add that no data is in the record on TSS concentrations from ash pile runoff or control of that problem.

We express no opinion as to whether, in fact, the limitation is appropriate or whether the technology (settling ponds) is acceptable. We merely conclude that the regulations are not supported by the record and that on remand EPA must establish that the required control techniques applicable to such sites can reasonably be expected to achieve the required effluent reduction which also must be supported by the record.

(j) *EPA's No-Discharge Standard for Fly Ash Transport*

As previously noted, EPA, in setting new source standards under § 306 of this Act, adopted a rule requiring no discharge of suspended solids from fly ash transport water.[76] As a result, coal-fired power plants will be required to use dry fly ash transport systems. Industry contends that in developing this no-discharge standard, EPA failed to analyze thoroughly the factors set forth in § 306. In essence, it is Industry's position that EPA has failed to show that dry fly ash transport systems are available to all sources required to employ them. We agree.

In support of its no-discharge regulations, EPA asserts that the record shows the successful use of dry systems at nine geographically dispersed centers and that the agency thoroughly considered the data derived from these sites in developing the dry fly ash standard. An examination of those portions of the record cited to us by EPA, however, indicates that the agency engaged in no meaningful consideration of the cost of achieving the required effluent reduction or the nonwater quality environmental impact and energy requirements associated with such systems as is required by § 306(b)(1)(B).

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[76] 40 CFR §§ 423.15(e), 423.25(e). The problem is compounded by the fact that air pollution laws and regulations require the collection of almost all fly ash from the stack exhaust which should be distinguished from bottom ash which collects in the furnace bottom.

Two of the references cited by EPA refer to mostly illegible handwritten notes which are untranslated and largely meaningless. A third reference refers to a one-page summary of a telephone conversation which purports to set forth only the installation cost figures for such systems at two unnamed Georgia Power Company plants. And that report fails to set forth any details as to the systems relative to the type of coal employed or the manner in which the ash is disposed of.[77] In addition, three of the reports relied upon by EPA are, in fact, environmental impact statements for proposed generating units not then in operation. These reports cannot support EPA's contention that dry fly ash systems are a "demonstrated" form of technology.[78] Finally, EPA refers to a report on the Centralia Steam Electric Project. That report indicates, however, that that unit is a mine mouth plant which uses low sulfur coal from a strip mine located immediately adjacent to the plant site. The ash which is generated by plant operations is hauled back into the mine, a unique arrangement not generally available to most power stations.

That, then, leaves only two plants which purportedly have dry fly ash systems—one in New York State and another at Turkey Point, Florida. The only indication in

[77] It is, nevertheless, interesting to note that even this report discounts the value of cost estimates on the ground that "costs can only be realistically evaluated on a plant-by-plant basis, where specific conditions of application are recognized." 12 App. at 80.

[78] One of the reports relating to the proposed Navajo Project indicates that even if dry fly ash systems were deemed to be "demonstrated," there might be serious non-water quality environmental consequences arising from their use in certain regions. It is there noted that the National Park Service has raised questions as to whether there is sufficient soil readily available in that area to cover the ash so as to stabilize it without seriously scarring large areas of land. In all events, we do not believe an environmental impact statement may be substituted for compliance with effluent limitations.

the report as to the manner in which fly ash is treated at Turkey Point is the assertion that:

> "Fly ash from mechanical collectors is recirculated to the boilers for reburning. Accumulated ash in the boiler bottoms is removed by hand and sold for the vanadium content."[79]

There is no indication whether the plant is coal- or oil-fired;[80] what type of ash storage is employed; what the cost of any dry fly ash system was; or what, if any, non-water quality impact the use of such a system has had on the adjacent area.

The report on the New York station, located at Ludlowville, is no more complete in terms of satisfying the criteria set forth in § 306(b)(1)(B). That report indicates that the total generating capacity at the site is only 300 MW. There is no indication as to the amount of ash produced annually, but it appears that it is collected in silos and disposed of by trucking it away to land fill sites. While it appears that the dry collection system was installed in 1972 at a cost of $5.6 million, there is no indication as to the resulting effluent reduction which occurred, if any. Moreover, the report does not show the methods employed to stabilize the fly ash at the disposal area or the costs associated with such disposal. Finally, there is no indication as to the effect landfill disposal has upon the environment or the energy requirements for the transfer of the ash from the plant site, considerations mandated by § 306.

Thus, whether taken as a whole or read separately, the reports cited to us in the record belie EPA's assertion that dry fly ash systems have been used successfully in nine

[79] 17 App. 103.

[80] Industry contends in its brief that the plant is, in fact, oil-fired and, therefore, the amount of ash generated is relatively insignificant. Pet. Reply Br. at Addendum IV, p. 5.

geographically dispersed areas of the country. Moreover, it is apparent that EPA has not adequately considered the costs associated with the required technology. The only cost data referred to in EPA's brief [81] is based upon the one-page summary of a telephone conversation regarding two unnamed power stations. As has been noted, that report does not set forth the nature of the systems employed or the manner of ash disposal.

Thus, based upon the present state of the record, we set aside the dry fly ash regulations, 40 CFR § 423.15(e) and § 423.25(e), for new sources and remand them for further consideration. On remand, EPA is directed to fully and systematically explicate the basis for its actions, giving full weight to the statutory factors set forth in § 306 of the Act. It should negate Industry's well taken complaint that "[t]here is no information in the record to show detailed studies of dry fly ash transport and disposal systems and techniques."

(k) *Credit for the Intake of Pollutants*

Industry next challenges EPA's chemical effluent limitations on the ground that the standards imposed are absolute and apply regardless of the pollutants in a plant's intake water. It is Industry's position that EPA has no jurisdiction under the Act to require removal of any pollutants which enter a plant through its intake stream. We agree.

Section 301(a) of the Act provides that "the discharge of any pollutant by any person shall be unlawful." [82] In turn, § 502(12) defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source. . . ." [83] Thus, the Act prohibits only

[81] Respondent's Br. at 102, fn. 123.

[82] 33 USC § 1311(a).

[83] 33 USC § 1362(12).

the addition of any pollutants to navigable waters from a point source. Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass.[84] By imposing gross limitations, Industry argues that EPA has charged each point source with the responsibility of removing not only its own increment of pollutant from the waterway but also all pollutants, natural or otherwise, presently in the waterway.

EPA asserts that the objection about which Industry complains has been remedied by recent amendments to the regulations. Specifically, 40 CFR § 125.28 provides that a discharger will be credited for pollutants in his intake water, but only if he "demonstrates . . . that specified pollutants which are present in the . . . intake systems designed to reduce process wastewater pollutants and other added pollutants to the levels required by applicable limitations or standards." [85] Industry is, nevertheless, required to treat and reduce pollutants other than those added by the plant process. This, we are of opinion, is beyond the scope of EPA's authority.

Industry would have us set aside the present utility industry regulations and remand them to EPA in order that they may be redrafted to cover only net as opposed to gross discharges of pollutants. We feel this is unnecessary, however. Instead, we are of opinion that the regulations here challenged may be brought into conformity with the Act by construing 40 CFR § 125.28(a)(2) to read as follows:

[84] Such a plant may not, of course, replace a natural constituent in the incoming water, for example sand and silt, with a different contaminating pollutant, for example phosphate, in its waste stream since discharge of the latter would constitute an "addition" of a new pollutant by the plant.

[85] 40 Fed. Reg. 29850 (1975).

> "The applicant demonstrates to the Regional Administrator, prior to the issuance, denial or modification of his permit, that specified pollutants which are present in the applicant's intake water will not be removed by wastewater treatment systems *as* designed *and used to* reduce process wastewater pollutants and other added pollutants to the levels required by applicable limitations or standards."

Thus, we construe the reference to a "treatment system" in § 125.28(a)(2) to mean those systems designed and used for the removal of process waste water polluants. This allows industry a credit for all pollutants in a particular plant's water supply, and the present regulations, though couched in terms of gross limitations, will, in effect, be construed to impose only net discharges standards. As such, no plant could be said to be in violation of the limitations on account of pollutants that it did not add to the water.

(1) *Unique Factors Affecting Consolidated Edison*

Consolidated Edison seeks more flexible regulations due to its somewhat unique location in New York City. It cites the age of its buildings with the accompanying problems, the unavailability of land, the actual use for navigation of the already badly polluted New York harbor, and the extremely high costs; factors which it and other power companies physically located in highly populated industrialized areas must face.

While it must be acknowledged that the problems faced by Consolidated Edison are those of few, if any, of the other power companies in the country, so far as its petition may be read as a request for leniency because of the already polluted condition of the harbor, it must be rejected. The 1972 amendments to the statute changed the system from

that of control of the quality of the body of water to effluent limitations as we have before noted.

But we have, we think, in providing for a more liberal variance provision, afforded this utility an avenue for relief. If it is doing all that the maximum use of technology within its economic capability will permit *and* if such use will result in reasonable further progress toward the elimination of the discharge of pollutants (which recitations are not meant to be taken as an inflexible standard in the preparation of a new variance provision), no reason appears why Consolidated Edison should not be able to procure such a variance should it comply with any other requirements of the variance. In so noting, we do not imply that Consolidated Edison is or may be entitled to any such variance. That question is not before us now and should await action for a variance.

We do not imply that such qualifications may be cost free; far from it, for economic capability of the applicant will be judged by the agency considering the variance application.

CONCLUSION

In summary, the following regulations are set aside and remanded to EPA for further consideration:

40 CFR § 423.12(a)—variance provision for effluent limitation guidelines representing the degree of effluent reduction attainable by the application of the best practicable technology currently available.[**]

40 CFR § 423.13(l)(m), as amended by 40 Fed. Reg. 7095-96—Thermal backfit requirements representing the degree of effluent reduction attainable by application of the best available technology economically achievable.

[**] 40 CFR § 423.12(a) is the only regulation specifically mentioned in the briefs. We will doubtless be advised upon receipt of this opinion if other like sections were intended to have been the subject of review.

40 CFR § 423.13(1), as amended by 40 Fed. Reg. 7095-96, and 40 CFR § 423.15(1), and 40 CFR § 423.25(1)—EPA's ban on the use of new and existing cooling lakes as an acceptable form of closed-cycle cooling.

40 CFR §§ 423.40 through 423.43—rainfall runoff limitations for material storage and construction site runoff.

40 CFR § 423.15(e) and 40 CFR § 423.25(e)—EPA's no-discharge limitation for fly ash transport water. In addition, we direct that EPA reevaluate (a) its requirements for closed-cycle cooling at generating units located along the nation's coastlines, and (b) its refusal to create a subcategory for AEC approved nuclear generating stations. We further direct EPA to include a variance provision for new sources in accordance with this opinion.

Breitenstein, Circuit Judge, concurring and dissenting:

I concur in the majority opinion except for its rejection of the variance provision which is found in 40 C.F.R. § 423.12(a) and which applies to the limitations set for the 1977 step in the "Generating Unit Subcategory."

Section 423.12(a) is virtually identical to the variance provisions for the 1977 step found in the regulations for the "Inorganic Chemicals Manufacturing Point Source category." See e.g. § 415.62. Our decision in *Dupont* v. *Train*, Nos. 74-1261 etc., dealt with the Inorganic Chemicals Category, recognized the regulatory variance applicable to the 1977 step and the statutory variance applicable to the 1983 step, and then said, slip opinion p. 20:

> "The administration of these provisions in practice is a matter of speculation at the present. The question will arise when a claim for a variance is made in a permit application."

In *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, opinion filed April 23, 1976,

the Second Circuit rejected an attack on the variance clause pertaining to the 1977 step and followed our decision in *DuPont* v. *Train*. See slip opinion p. 8. In so doing the Second Circuit said, slip opinion p. 10:

> "It would be premature at this point to consider whether the variance clause will be interpreted with sufficient liberality to accomodate all legitimate demands for flexibility. Such questions should await the disclosure and development of concrete factual controversies involving a single point source and its permit."

In providing for a permissible variance in the 1977 step, EPA was properly exercising its § 501(a), 33 U.S.C. § 1361(a), power "to prescribe such regulations as are necessary to carry out his [the Administrator's] functions under this Act." The statute, § 301(c), 33 U.S.C. § 1311(c), provides a variance procedure pertaining to the 1983 step and refers to the "economic capability" to comply with the requirements of § 301(b) (2) (A). I agree that a regulatory variance applicable to 1977 should not be more stringent than the statutory variance provided for 1983. Properly construed and applied § 423.12(a) is not more stringent.

The regulation begins by saying in its first sentence that EPA in establishing limitations took into consideration specified factors, including "age and size of plant, utilization of facilities, * * * control and treatment technology available, energy requirements and costs." The third sentence says that a discharger may submit evidence:

> "[T]hat factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines."

The fourth sentence says that the permit issuer "will make a written finding that such factors are or are not fundamentally different."

The majority opinion construes the phrase "such factors" to apply only to "technical and engineering factors." The majority's attempt, fn. 21a, to distinguish this case from *DuPont* v. *Train* does not convince me. The EPA interpretation mentioned in fn. 21a was before us when we decided *DuPont* v. *Train*. A reasonable interpretation of § 423.12(a) is to apply the word "such", as used in the third and fourth sentences, to the factors mentioned in the first sentence. That interpretation makes the regulatory variance for 1977 substantially conform with the statutory variance for 1983.

In any event I would not vacate and remand § 423.12(a) on the assumption that on a claim for variance EPA will give consideration only to "technical and engineering factors," and will ignore economic capability. The langauge of the regulation is "equipment or facilities involved." The regulation does not foreclose consideration of all the factors mentioned in the first sentence. If assumptions are to be made, I would assume that EPA would not apply the regulatory 1977 variance more stringently than the statutory variance for 1983. The statute, § 301(c), mandates consideration of "economic capability."

I agree with the Second Circuit that the question should await "concrete factual controversies." My dissent is confined to the action of the court in setting aside and remanding § 423.12(a).